

UNITED STATES; DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BLACK LOVE RESISTS IN THE RUST,  
et al., Plaintiffs,

18-CV-719 (CCR)

vs.

CITY OF BUFFALO, et al.,  
Defendants.

Buffalo, New York  
October 23, 2024

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**MOTION HEARING**

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE CHRISTINA CLAIR REISS  
UNITED STATES DISTRICT JUDGE

FOR PLAINTIFFS: NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE  
BY: CLAUDIA WILNER, ESQ.  
50 Broadway, Suite 1500  
New York, New York 10004-3821  
BY: ANJANA MALHOTRA, ESQ.  
275 7th Avenue, Suite 1506  
New York, New York 10001  
-and-  
COVINGTON & BURLING LLP (NY)  
BY: CHRISTINE ADRIENNE NELSON, ESQ.  
BY: JORDAN SCOTT JOACHIM, ESQ.  
620 Eighth Avenue, Suite 4029  
New York, New York 10018  
-and-  
WESTERN NEW YORK LAW CENTER, INC.  
BY: MATTHEW ALAN PARHAM, ESQ.  
37 Franklin Street  
2nd Floor, Suite 210  
Buffalo, New York 14203

FOR DEFENDANTS: HODGSON RUSS LLP  
BY: HUGH M. RUSS, III, ESQ.  
BY: CHEYENNE NICOLE FREELY, ESQ.  
BY: PETER A. SAHASRABUDHE, ESQ.  
The Guaranty Building  
140 Pearl Street, Suite 100  
Buffalo, New York 14202

COURT REPORTER: Diane S. Martens  
dmartensreporter@gmail.com

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P R O C E E D I N G S

\* \* \*

**THE CLERK:** Your Honor, the matter before the Court is civil case number 18-CV-719, *Black Love Resists in the Rust v. City of Buffalo, et al.*

Present for the plaintiff are attorneys Claudia Wilner, Anjana Malhotra, Jordan Joachim, Christine Nelson and Matthew Parham.

Present for the defendant are attorneys Hugh Russ, Cheyenne Freely and Peter Sahasrabudhe.

And we're here for a hearing on a motion to certify the class.

**THE COURT:** Good morning.

We have a number of people who are going to join by YouTube. There is no recording per judicial conference policies. Please respect that. My understanding is the YouTube is the first time the Western District of New York has done this. They did it at the parties' request. And it was because our Zoom licenses would have cut off the number of participants. So, please honor that.

And we have all day to do this. So let me ask you, first: If either party plans on presenting evidence?

**MS. WILNER:** No, your Honor.

**THE COURT:** No.

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10:06AM 1 How about from the defendants?

2 **MR. RUSS:** No, your Honor, thank you.

3 **THE COURT:** And then the way we're going to proceed is  
4 moving party, opposition, brief rebuttal.

10:06AM 5 I'm going to ask that you announce yourself each time  
6 you speak not only because we have a number of attorneys but  
7 that will help us create a record and it will also help the  
8 people who are participating by YouTube.

9 I have a number of things that I am thinking about. I  
10:07AM 10 call them musings. They're not rulings. These are things  
11 that are troubling me and I sometimes do this in advance of a  
12 hearing to let you know what I am stuck on. You should feel  
13 free to push back on it. Don't throw away, don't jettison  
14 your entire presentation because I am on some other issue.  
10:07AM 15 Don't be hesitant to correct me. These are just some of the  
16 things that I'm wondering about.

17 So it would help me if you are as pragmatic as possible.  
18 I'm a very pragmatic person. And, so, it isn't going to help  
19 me decide whether or not to grant Class Certification if you  
10:07AM 20 tell me something like there is going to be mini-trials or  
21 they're common questions of fact and law. I like to hear, if  
22 you could, how you think that's going to play out in realtime  
23 in terms of motion for summary judgment, could the Fourth  
24 Amendment violations be resolved by summary judgment? What  
10:08AM 25 would happen at trial in terms of general versus individual

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10:08AM 1 damages. That would be the most helpful to me.

2 One of the issues in this case is the issue of general  
3 damages versus individual damages and I know that's an area  
4 of dispute. It's one thing if the plaintiffs' position is

10:08AM 5 everybody was unreasonably detained for both the initial  
6 checkpoint and the secondary stop, and I can imagine that  
7 would not require individual trials. But if there's going to  
8 be individual damages that examine the difference between two  
9 tickets for tinted windows versus five tickets or a stop that

10:09AM 10 lasts 20 minutes versus a stop that lasts 45 minutes, then we  
11 are really getting into individual inquiries and I don't  
12 really see Class Certification providing answers or common  
13 evidence in that. So I want to trail down on that, and  
14 especially since one perspective, the individual damages in

10:09AM 15 some cases will be de minimis. So what you would get  
16 compensated for for getting a tinted window ticket on one  
17 occasion when it wasn't, it should not have been issued is  
18 not something that I think that we would typically have at  
19 trial over an inquiry. So I want to, you know, drill down  
10:10AM 20 into the pragmatics of how that would work.

21 The proposed Class that I am most concerned about is the  
22 Traffic Enforcement Class which is roughly defined as Black  
23 and/or Latino individuals who have driven their vehicle in  
24 the city of Buffalo and an intent to do so in the future.

10:10AM 25 From the Court's perspective, that looks fairly

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10:10AM 1 limitless. It also would be unusual in terms of injunctive  
2 relief. I'm trying to think of how I would fashion it. I  
3 would have to think about, okay, what's the checkpoint going  
4 to look like in the future because I think everybody agrees  
10:10AM 5 that they have ceased. But they haven't been abandoned, they  
6 haven't been disavowed so I want to hear more about that  
7 Traffic Enforcement Class because that really seems quite  
8 unmanageable from the Court's perspective and it just doesn't  
9 seem to be mapped on to the problem that brings this case to  
10:11AM 10 the court.

11 We won't be discussing the merits of the case except as  
12 they interplay with Class Certification. But I am stumped as  
13 to the logic of the checkpoints and I'm looking mostly to the  
14 defendants to tell the Court the logic. So the touchtone for  
10:11AM 15 the Fourth Amendment is reasonableness. And if the idea is  
16 that we want to have a checkpoint to intercept crime, to  
17 deter crime, then I don't really understand the traffic  
18 violation part of it. If it doesn't have anything to do with  
19 traffic enforcement, is that some kind of like secondary  
10:11AM 20 gratuitous purpose added on to it? And, if so, that seems  
21 like a lot of overkill. I'm just kind of wondering about it.

22 One of the exhibits points this up fairly clearly. I'm  
23 looking at Exhibit 58. And it's a email: "BDC Lockwood  
24 wants results with this increased daytime detail. All  
10:12AM 25 officers should be made aware of this and what is expected of

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10:12AM 1 them in the past. The officers assigned to the daytime  
2 detail have always yielded good results and we all expect  
3 this to continue into the future."

4 "BDC Lockwood also wants two traffic checkpoints run  
10:12AM 5 during the daytime detail, one of them at approximately 12  
6 noon. As you have all done in the past, the checkpoint  
7 locations should be conducted in and around recent areas of  
8 violence. For example, if there was a shooting during the  
9 previous night at Broadway and Fillmore, then the traffic  
10:13AM 10 checkpoint should be conducted in that vicinity."

11 So that kind of makes no sense to me because unless  
12 you're expecting evidence of a crime to be passing through  
13 the checkpoint in the 24 or 48 hours after the crime, it just  
14 seems to me more a show of police presence in an area that  
10:13AM 15 recently expected or suffered, you know, a violent crime.  
16 And there's a lot of other ways to do that besides detaining  
17 motorists and issuing tickets.

18 So I know we're kind of into the merits and I know the  
19 plaintiffs argue that this was a revenue-generating event on  
10:13AM 20 the backs of minority populations in certain housing areas  
21 but I'd like to hear from the defendants how it works, how a  
22 checkpoint actually was intended to work, and why it works.

23 There are some issues in this case which I think we  
24 could agree on, and from the Court's perspective, a good  
10:14AM 25 advocate generally concedes them. For example, I don't

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10:14AM 1 believe there are antagonistic interests among the proposed  
2 Classes. So, I've had Class Certifications where -- dairy  
3 farmers come to mind -- where some people belong to a coop  
4 and some people did not and they really didn't have the same  
10:14AM 5 interests. I don't see that problem in this case and I'm  
6 wondering if the defendants agree.  
7 I also, as I read through Michael Gennaco's lengthy  
8 expert report, I didn't see how failure to train and  
9 supervise investigation of the complaints, documentation,  
10:15AM 10 recording, discipline of officers was relevant to Class  
11 certification and I also wondered how it would even come into  
12 the case. So I was wondering why I was reading about all of  
13 that in this particular case unless, unless I'm missing  
14 something about the claim. So, lots of criticism about what  
10:15AM 15 the Buffalo Police Department is doing wrong and how they're  
16 responding in the aftermath of police alleged misconduct but  
17 it didn't seem to me to go to the core issues. And maybe you  
18 just provided it as something that would come up later in the  
19 case.  
10:15AM 20 One of the central issues in this case, and maybe the  
21 central issue, is the framing of the issue as to whether the  
22 stops were unconstitutional as now set up. Never mind who  
23 goes through or what happens, this is not a reasonable  
24 detention of motorists and the defendant's efforts to push  
10:16AM 25 this into, judge, you're going to have to be deciding whether

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10:16AM 1 there's probable cause, you're going to have to look at, you  
2 know, whether or not there was an infraction.

3 I don't see that I will be doing that because the  
4 plaintiffs are masters of their complaint and if they're not  
10:16AM 5 going to be asking the Court or a jury to do that, I don't  
6 see that I would.

7 The defendants have the better part of the argument,  
8 however, when we get into individualized damages. And then I  
9 think that you do look at that if you are going to say  
10:16AM 10 somebody who was arrested without probable cause suffers the  
11 same injury as somebody who was arrested for an outstanding  
12 warrant, I'm not so sure I would agree unless the plaintiffs'  
13 argument is that it's all fruit of the poisonous tree, it's  
14 all the same injury, you are going to recover for every  
10:17AM 15 arrest, there's going to be a set amount of recovery that's  
16 requested.

17 So those are just some of the things that are bothering  
18 me and, as I said, you should feel free to push back on them  
19 and go your own way but those are -- I like to tell you what  
10:17AM 20 I'm struggling with first.

21 Let's start with the plaintiff and remember to announce  
22 yourself before you speak.

23 **MS. WILNER:** Just one moment, your Honor.

24 **THE COURT:** Sure.

10:17AM 25 **MS. WILNER:** Good morning. And may it please the Court.



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10:17AM 1 Claudia Wilner for the plaintiffs.

2 We're here today to seek certification of three Classes

3 in this case challenging longstanding traffic enforcement

4 policies and practices of the Buffalo Police Department that

10:18AM 5 have greatly harmed and continue to harm Black and Latino

6 communities. The claims are earmarked (phonetic) for Class

7 certification. For the damages Class, each damages Class, it

8 is challenging just one policy and practice that has harmed

9 all of the Class members in the same way.

10:18AM 10 Across the Classes, all of the injunct -- all of the

11 liability questions are common. The injunctive relief that

12 we're requesting for the Traffic Enforcement Class is common

13 to all of the members of that Class. They're all asking the

14 same thing which is reform to policies and practices of the

10:18AM 15 Buffalo Police Department.

16 For the damages, many of the damages questions are

17 common and there are no significant individual defenses. So

18 I really --

19 **THE COURT:** No significant individual defenses, but

10:19AM 20 individual damages. So --

21 **MS. WILNER:** Yes.

22 **THE COURT:** -- they might have not, you know, we're not

23 going to hear officer by officer why he or she did this but

24 your clients are asking for different kinds of damages. Is

10:19AM 25 that conceded?

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10:19AM 1 **MS. WILNER:** Yes. Yes. That's true. Some of the  
2 damages, categories of damages that they're asking for are  
3 common and some are individual. What I had thought made  
4 sense in my mind -- but you're the judge so it might not make  
10:19AM 5 sense in your mind -- was to walk through the Rule 23 factors  
6 for each of the Classes and I've prepared some slides just to  
7 help do that. And I'm really happy to -- I mean, if you want  
8 to start by talking about damages, we can do that or we can  
9 stop when we get to that slide and really go through the  
10:19AM 10 different categories of damages and how we see them playing  
11 out in the trial in this case.

12 **THE COURT:** I'm happy to do it your way.

13 **MS. WILNER:** Okay, great. Thanks.

14 In that case I'll start by talking about the damages  
10:20AM 15 Classes. This is a certification under Rule 23(b)(3). We'll  
16 start with the Checkpoint Class. We've got almost 4,000  
17 members of this Class. This is people who received a ticket  
18 or were arrested at traffic safety vehicle checkpoints. And  
19 I know you have asked defendants to comment on how the  
10:20AM 20 checkpoints were operated. I can talk a little bit about  
21 that from our perspective of what the evidence shows.

22 The checkpoints were established by formal and  
23 directive. They were operated under written guidelines from  
24 2013 to June 2024. The Commissioner chose the checkpoint  
10:20AM 25 locations personally. And he placed 78 percent of those

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10:20AM 1 checkpoints in Black and Latino communities. So from  
2 June 2014 and after, lieutenants picked checkpoint locations  
3 following his model under his supervision and they put  
4 87 percent of checkpoints in Black and Latino communities.

10:21AM 5 Each checkpoint was operated in the same way under the  
6 directive. So all cars were funneled through the checkpoint  
7 for a first inspection which occurred without any  
8 individualized suspicion. And then some cars were detained  
9 for a secondary inspection and it was after that secondary  
10 inspection that tickets and arrests and impounds happened.

11 And so our Class is seeking damages under the Fourth  
12 Amendment for the unlawful detentions that occurred prior to  
13 the tickets and impounds. And they're seeking damages under  
14 the Fourteenth Amendment Equal Protection Clause and Title VI  
10:21AM 15 for racial discrimination under the Equal Protection Clause.  
16 And they also have due process claims that are under the  
17 Fourteenth Amendment that concern a structural conflict of  
18 interest and those are actually the same claims that the  
19 tinted windows Class has.

10:22AM 20 **THE COURT:** So I was listening but I didn't quite catch  
21 it. It's just the initial detention or it's the initial and  
22 the secondary?

23 **MS. WILNER:** Well the initial and the secondary, yes.

24 **THE COURT:** Okay.

10:22AM 25 **MS. WILNER:** Under the Fourth Amendment but the Fourth

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10:22AM 1 Amendment claim, from our perspective, really stops with the  
2 ticket and the arrest. So we're not seeking damages under  
3 the Fourth Amendment for anything that happened after the  
4 moment -- after the detention ends, essentially.

10:22AM 5 All of the liability questions for the Checkpoint Class  
6 are common and we listed a number of common questions in our  
7 brief and I'm not running away from any of those questions  
8 but I wanted to highlight today a few that I think are really  
9 important.

10:23AM 10 The first is: What was the programmatic purpose for the  
11 checkpoints? Was it for crime control? High visibility?  
12 Was it for traffic safety, as the defendants claim? This is  
13 a critical factual question that's going to determine  
14 liability and it's common to every single Class member.

10:23AM 15 Another really important question is whether the  
16 checkpoint satisfied the special needs exception that the  
17 Supreme Court has set forth for limited operation of  
18 administrative checkpoints under certain circumstances. This  
19 is a legal question that every single member of the

10:23AM 20 Checkpoints Class is going to have and it will determine for  
21 every member of the Class whether they win or whether they  
22 lose on the Fourth Amendment claim. Maybe not whether they  
23 lose. I'm not sure I'll concede that yet but certainly  
24 whether they win.

10:23AM 25 So, on our Equal Protection and Title VI claims, were

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10:23AM 1 the checkpoints disproportionately placed in Black and Latino  
2 neighborhoods? Was the City's choice of checkpoint locations  
3 motivated by racial demographics or racial animus? These are  
4 the most important questions to determining liability on an  
10:24AM 5 Equal Protection claim. And, again, they're common to every  
6 Class member because the checkpoints were operated in a  
7 centralized way.

8 The due process claims I'd like to defer a little bit  
9 until talking about the Tinted Windows Class but the  
10:24AM 10 questions are the same for both Classes and that only  
11 underscores the commonality.

12 And then, of course, because we have claims for  
13 municipal liability, we have to establish the requirements of  
14 *Monell v. Department of Social Services*, that requires  
10:24AM 15 establishing that all of these things happened under  
16 municipal policy, custom or practice and that is going to be,  
17 again, a common question for all of the Class members.

18 Your Honor already shared your thoughts that you don't  
19 see disputes between the Class representatives and members of  
10:25AM 20 the Class that would disturb findings of typicality and  
21 adequacy and I just wanted to confirm our position that that  
22 is absolutely the Class.

23 **THE COURT:** I also don't see a conflict between your  
24 proposed Classes. So, you're not going to, if we had a  
10:25AM 25 Traffic Enforcement Class, they aren't going to get something

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10:25AM 1 that would take something away from the Tinted Windows Class.

2 **MS. WILNER:** Yes. That's exactly right, your Honor.

3 And I wanted -- I mean the defendants had raised this  
4 point under their discussion of typicality and adequacy was

10:25AM 5 one of their primary points that the case was going to  
6 devolve into mini-trials because of this need to determine  
7 the individual circumstances of each stop. And from the  
8 plaintiffs' perspective, that's absolutely false. So, under  
9 the Fourth Amendment, again, we're only seeking damages for

10:25AM 10 unlawful detention.

11 So there is no need ever in this case to determine  
12 whether tickets were supported by probable cause, whether the  
13 probable cause justified them, whether they were unjustified,  
14 all of that on the merits of the ticket is not going to be  
10:26AM 15 relevant to the Fourth Amendment claim.

16 **THE COURT:** I agree on the merits of the ticket. Once  
17 you get into the secondary inspection, isn't there an inquiry  
18 into whether it was justified or not?

19 **MS. WILNER:** I don't think so, your Honor, because then  
10:26AM 20 we're into our fruit of the poisonous tree argument and the  
21 Second Circuit case that's on -- that controls -- and I'm  
22 just now blanking on the name of it but it's in our brief --  
23 that said that the causation point was cut off by independent  
24 actions of the prosecutor and the judge. And so anything  
10:26AM 25 that's happening before then where it's just continued

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10:26AM 1 actions by the police department is fair game under the  
2 Fourth Amendment, and that secondary detention, you know,  
3 never would have happened had the car not first been subject  
4 to an illegal first detention. So it all flows together into  
10:27AM 5 the same.

6 Under the Equal Protection Clause, the Supreme Court has  
7 made it very clear that racial discrimination is actionable  
8 even if a stop or a ticket is supported by probable cause.  
9 And, so, there's really no need under the Equal Protection  
10:27AM 10 Clause again to look into the question of whether the ticket  
11 was justified. That's not the question. The question is  
12 whether it was motivated by racial animus and that gives rise  
13 to harm, regardless of whether there was a legal  
14 justification for the action.

10:27AM 15 I'm going to stop really briefly on ascertainability  
16 just in case your Honor has questions about our Class  
17 definition. I think there is no ascertainability issue in  
18 this case. The Second Circuit standard is really clear: A  
19 Class must be defined using objective criteria that establish  
10:28AM 20 a membership with definite boundaries.

21 Our Class definition is up for you on the screen. It  
22 clearly does that. There's no administrative feasibility  
23 requirement in the Second Circuit. So if there are concerns  
24 about Class member identification -- and I don't think there  
10:28AM 25 are -- but if there were, that would be something that would

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10:28AM 1 be considered as part of the superiority analysis. It's not  
2 a threshold that would impede certification under  
3 ascertainability.

4 And I want to -- well, let me ask before I move on. Are  
10:28AM 5 there any other questions that the Court has about the  
6 Checkpoints Class or any of the points that we've discussed  
7 so far?

8 **THE COURT:** Not about the Checkpoint Class.

9 **MS. WILNER:** Okay, wonderful.

10:28AM 10 So let's stop and talk a little bit about the Tinted  
11 Windows Class and this Class is challenging the issuance of  
12 multiple tinted windows tickets in a single stop. And this  
13 was a practice that was directed overwhelming at Black and  
14 Latino drivers and that three successive BPD commissioners  
10:29AM 15 knew about and intentionally allowed to continue.

16 The Class is bringing equal protection and title six  
17 claims for racial discrimination. It also brings due process  
18 claims. Those are structural due process claims that I  
19 referenced before. We've had over 6,000 people who have been  
10:29AM 20 subjected to these practices that we've identified who meet  
21 the Class definition. So there's clearly no numerosity  
22 issue.

23 And I wanted to pause and highlight some of the racial  
24 disparities. These are all contained in the expert report of  
10:30AM 25 Dr. Bjerk that was submitted in support of the motion.



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10:30AM 1 **THE COURT:** Let me stop you. And in terms of logic --

2 **MS. WILNER:** Yeah.

3 **THE COURT:** -- why is it multiple tickets as opposed to  
4 one ticket? I understand that I've seen the memos where they  
10:30AM 5 say let's not engage in overkill, two tickets for tinted  
6 windows is enough, you don't need to be doing six.

7 What was the method to why isn't it one, why is it -- is  
8 it always two, is it?

9 **MS. WILNER:** Yeah. So in thinking about this Class, and  
10:30AM 10 it's, it's a good question because -- and you can see even  
11 looking at the numbers with 87 percent of tinted tickets  
12 going to Black and Latino drivers, you know, overall, that  
13 this was a practice that just at its most basic level was  
14 grossly disproportionate. But the issuance of multiple  
10:30AM 15 tickets is particularly disturbing and that's because when  
16 you're, whether an officer is thinking about a single tinted  
17 windows ticket, there could be a factual question, are the  
18 windows unlawfully tinted, are there not? But there's no  
19 question about once the decision has already been made to  
10:31AM 20 stop the car and issue the tickets, then there really  
21 shouldn't be a particular reason or a difference in how  
22 people are treated at that stop.

23 And what the evidence shows is that even after within  
24 the world of people who are getting tinted windows tickets at  
10:31AM 25 all, there is really significant and statistically

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10:31AM 1 significant disparity in terms of who is getting the multiple  
2 tickets. So the multiple ticketing rate is 15 percent higher  
3 for black and Latino drivers from 2013 to 2020. That, when  
4 you're talking about statistics, is a really significant  
10:32AM 5 difference and at its height, 90 percent of Black and Latino  
6 drivers who received tinted windows tickets at all were  
7 receiving multiple tickets in a single stop. And the  
8 economic harm that's piled on for that gratuitous ticketing  
9 is really damaging.

10:32AM 10 **THE COURT:** But to get to dis-proportionality, don't you  
11 have to look at, all right, here's all of the cars that are  
12 registered to everybody, here's the proportion of them that  
13 are registered to Black and Latino drivers. Now we look at  
14 the tinted window tickets and that's what we have to look at  
10:32AM 15 that, all people with tinted windows. I didn't really see  
16 that. Do you think you've done that?

17 **MS. WILNER:** I'm....

18 **THE COURT:** So otherwise you might be targeting  
19 something. It might look like it's disproportionate but it  
10:33AM 20 just may be that a certain group of people prefers tinted  
21 windows to fuzzy dice or people who have screens that, you  
22 know, block out the sunshine for somebody sitting in a car  
23 seat. So I didn't see the analysis proceed on that basis and  
24 I wondered why not.

10:33AM 25 **MS. WILNER:** Oh, yes, that issue actually is addressed

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10:33AM 1 in the Bjerk report and I think it gets at this question of  
2 why I focused on multiple tickets as opposed to just  
3 ticketing in general.

4 First of all, I do want to make clear that there  
10:33AM 5 actually isn't any evidence in the record and it isn't known  
6 what the true overall tinted windows ticketing rate is. But  
7 what the data shows --

8 **THE COURT:** Isn't --

9 **MS. WILNER:** -- is that --

10:33AM 10 **THE COURT:** -- the overall tinted windows so you don't  
11 even have a baseline of how many people drive with tinted  
12 windows and that's why I'm troubled by how you can get down  
13 to disproportionate because a true test would say, okay,  
14 there's 5,000 people in the city of Buffalo who have cars and  
10:34AM 15 2,000 of them have tinted windows, and of that 2,000, 1,500  
16 belong to Black and Latino drivers. And I just don't see  
17 that even Dr. Bjerk does that.

18 **MS. WILNER:** Oh, okay, I see what you're saying, your  
19 Honor. He, he actually does -- and this is the, this is  
10:34AM 20 the -- I think what I was getting at before, trying to get at  
21 before but probably was too long-winded, that once you're in  
22 looking at multiple ticketing, you're looking only within the  
23 universe of people who have been stopped and issued  
24 ticketed -- tinted windows tickets.

10:35AM 25 **THE COURT:** I follow you. I can see that.

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10:35AM 1 **MS. WILNER:** And within that universe there's a  
2 statistically significant disparity where Black drivers  
3 issued at least one ticket, tinted window ticket are  
4 statistically more likely to receive multiple tickets than  
10:35AM 5 white drivers issued tinted windows tickets.

6 **THE COURT:** Okay.

7 **MS. WILNER:** So, once you're in that baseline, all those  
8 other concerns of what is the population doing in general,  
9 how many cars have tinted windows at all, you know, those  
10:35AM 10 fall away because the disparity is only among incidents of  
11 ticket, tinted window ticket issuance.

12 **THE COURT:** Okay.

13 **MS. WILNER:** But I do want to point out some other  
14 things that showed up in the data that I do think are  
10:35AM 15 relevant to this. One is that the Bjerk report looked at  
16 data prior to the issuance of the strike force and at that  
17 time tinted window ticketing was lower and racial  
18 disparity -- multiple ticketing was lower and racial  
19 disparities in multiple ticketing were lower.

10:36AM 20 So there was a significant increase not only in tickets  
21 but also in disparities with the advent of the strike force  
22 that then after the Buffalo traffic violations agency came  
23 online magnified even further. So it really does suggest  
24 that there was a change in behavior within the Buffalo Police  
10:36AM 25 Department. Not -- because there's no reason to suspect, to

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10:36AM 1 think that within those years there was baseline change in  
2 the population in terms of who had tinted windows and who  
3 had -- didn't.

4 And there's also no reason to think -- this is getting  
10:36AM 5 back to the multiple ticketing disparities -- that there's  
6 any reason that, like, for example, nonminority drivers would  
7 tint only one window but everyone else would tint three or  
8 four windows.

9 **THE COURT:** So the narrow focuses: Secondary stop,  
10:37AM 10 multiple tickets between white drivers in the secondary stop  
11 and Black and Latino drivers, white or non-- nonBlack or  
12 nonLatino drivers and whether or not those two Classes can be  
13 compared and is there disproportion there? Just there?

14 **MS. WILNER:** I think I need to make a correction because  
10:37AM 15 the Tinted Windows Class is not limited to tickets that are  
16 issued at checkpoints.

17 **THE COURT:** Oh.

18 **MS. WILNER:** Some tinted windows tickets were issued at  
19 checkpoints but multiple tinted windows ticketing was a  
10:37AM 20 common practice that officers did when they were on regular  
21 patrol as well as on checkpoints. So our Tinted Windows  
22 Tickets Class is covering tinted windows ticketing wherever  
23 that happened not only at check points.

24 **THE COURT:** So then the comparator is much harder --  
10:37AM 25 like you sold me on the comparator at the secondary stop

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10:38AM 1 because I could imagine in pragmatic terms of we would have  
2 all that data, there would be a proportion, you could see it.  
3 When it's roaming around, how are you going to establish  
4 that?

10:38AM 5 **MS. WILNER:** I think the same points that I made before  
6 still apply because, again, we're only looking at disparities  
7 within the universe of people who are stopped and ticketed  
8 for at least one tinted windows ticket. So it's, the Equal  
9 Protection Claim isn't based on the stop. We're not

10:38AM 10 challenging whether the stop was justified, whether tinted  
11 windows tickets should have been issued, should not have been  
12 issued. The point is that Black drivers were really likely  
13 to get four tickets instead of one and that was much less  
14 true for white drivers.

10:38AM 15 **THE COURT:** All right. So you would characterize this  
16 as a non-checkpoint Class? I mean it could be but it would  
17 be -- it's much broader than that.

18 **MS. WILNER:** Yes, I would say it's much broader than the  
19 checkpoints and that shows in the size of the Class. There  
10:39AM 20 is more people who were affected by tinted windows tickets  
21 than who were affected by checkpoints ticketing. So there  
22 could be people who would be members of both Classes. For  
23 example, somebody who was issued multiple tinted windows  
24 tickets at a checkpoint would be a member of the Checkpoint  
10:39AM 25 Class and a member of the Tinted Windows Class. And how we

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10:39AM 1 see that playing out at trial is that that particular  
2 individual would have more opportunities to win liability but  
3 we are not expecting to like double-dip, as it were, in any  
4 categories of damages.

10:39AM 5 Have I answered all your questions?

6 **THE COURT:** You have.

7 **MS. WILNER:** Okay, great.

8 So I wanted to drill down on some of the questions that  
9 were raised and I wanted to stop a bit on the due process  
10:40AM 10 claim because it is a little bit of a less familiar claim.  
11 Arises from the Supreme Court decision in *Marshall v.*

12 *Jerrico*. And the Supreme Court said that: "A scheme  
13 injecting a personal interest, financial or otherwise, into  
14 the enforcement process may raise serious constitutional  
10:40AM 15 questions." And the Supreme Court made its findings about

16 prosecutors but courts have applied it, as well, to police  
17 officers. They hold police officers to the same standard as  
18 prosecutors and have found that where a police officer has a  
19 personal financial motivation to enforce the criminal law,  
10:40AM 20 that that can create a conflict of interest that violates the  
21 due process clause.

22 And really importantly for Class certification under the  
23 case law, this is an objective inquiry. So the  
24 constitutional question that has to be resolved is: Does the  
10:40AM 25 system create an intolerable risk of bias? It's not: Was an

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10:41AM 1 officer actually biased? Can an officer be proven to be  
2 biased? But simply is there an intolerable risk of bias.  
3 And that question, because it's objective, is going to be the  
4 same for every member of the Class.

10:41AM 5 So really important common questions that go directly to  
6 liability for this claim is whether city policies created an  
7 improper pecuniary or financial motivation for officers to  
8 enforce traffic laws and issue tickets and, if they did, was  
9 that conflict of interest so serious that it violates the due  
10 process clause? Those are the two most important and Monell  
11 liability obviously, as well, for that claim. And every  
12 Class member is going to have those same questions.  
13 Answering them is going to resolve liability for every single  
14 Class member at the same time.

10:42AM 15 **THE COURT:** So if you're not looking at just checkpoint  
16 data, though, and you're just looking at officers patrolling  
17 and issuing these tickets, I think it's going to be pretty  
18 hard to show a financial motive. So, in the checkpoints  
19 there is the overtime argument and then when this occurred  
20 and how long this occurred and you've got the officers  
21 involved and you can figure out the pay.

22 How are you going to prove it as a pragmatic matter for  
23 more roaming stops?

24 **MS. WILNER:** Well, it's really the same body of  
10:42AM 25 evidence, your Honor, because it has to do with the



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10:42AM 1 performance expectations that were set by the Commissioner  
2 and those didn't apply only to checkpoints. They applied to  
3 practices in general and the overtime expectations. And the  
4 tying of overtime possibilities to production, which is  
10:43AM 5 essentially a ticketing incentive because officers had the  
6 ability -- when tickets are tied to overtime opportunities,  
7 with the idea that more tickets justifies more overtime  
8 opportunities and also is an expected result of those  
9 overtime opportunities, and the overtime is so significant  
10:43AM 10 for these officers and some of these officers doubled their  
11 salaries by working overtime. Working overtime also not only  
12 just expanded their takehome pay but their eventual pension  
13 benefits. So there was significant financial opportunity for  
14 officers in working overtime.

10:44AM 15 And if the idea being promulgated from the City is that  
16 the more you ticket, the more overtime you can do, then that  
17 is a financial conflict of interest, at least our -- that's  
18 our belief and what we intend to present to the jury and then  
19 what we'll be asking the jury to decide.

10:44AM 20 **THE COURT:** So I'm having a hard time distinguishing  
21 that from any other police department anywhere, especially in  
22 the area of substance due process. It has to be a pretty  
23 significant constitutional violation, otherwise the Supreme  
24 Court has said go under the Fourth Amendment, that's more  
10:44AM 25 specific.

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10:44AM 1 I would assume that most, if not every, police  
2 department rewards productivity and offers overtime to the  
3 most productive officers who have crime-stopping and  
4 crime-intercepting abilities and, so, how is this any  
10:45AM 5 different? And looking at the policies, what are you zoning  
6 in on as the directive that makes this different from every  
7 other police department in the country?

8 **MS. WILNER:** Yeah. Thank you for the question.

9 And with all due respect -- and you can let me know if  
10:45AM 10 this is not a satisfactory answer -- but our job is to  
11 represent our plaintiffs and to look at the policies and  
12 practices of the Buffalo Police Department, and whether those  
13 policies and practices violate the due process clause. And,  
14 so, I don't think it's an element of our substantive claims  
10:45AM 15 how our -- how what happened here may or may not compare to  
16 what happened elsewhere.

17 **THE COURT:** Well you're asking me to find that this is a  
18 financial incentive and I'm pushing back and saying I assume  
19 there's a financial incentive in most police departments to  
10:46AM 20 be productive -- when I'm thinking about ascertainability in  
21 this. And I'm not seeing that this is some unique situation  
22 where the Court can say, yeah, we need to have a Class  
23 because this is going to zero in on a policy that is  
24 particular to the Buffalo Police Department.

10:46AM 25 **MS. WILNER:** Well, I do think there are some specific

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10:46AM 1 factors here that are important. I mean, the production  
2 expectations were pretty strong, the launch of the Buffalo  
3 Traffic Violation Agency which was specifically designed in  
4 order to bring in more revenue to the City of Buffalo, the  
10:46AM 5 reaction to the installation of the Buffalo Traffic  
6 Violations Agency which saw ticketing go up substantially  
7 after that came online, the training of officers, that one  
8 goal of traffic enforcement was to generate revenue, I think  
9 all of those things work together. And really, more  
10:47AM 10 importantly, your Honor, from the Class Certification  
11 perspective, there's nothing about any of those arguments  
12 that's specific to any particular Class member. All of our  
13 Class members can make those same claims.

14 **THE COURT:** Also one argument is there's no motion to  
10:47AM 15 dismiss the due process claims so you don't have to show me  
16 that it's plausible at this point in time. As it interplays  
17 with the Class, it does become an issue.

18 **MS. WILNER:** And we also have yet to have dispositive  
19 motions so there -- I, to me, the dispositive motion stage,  
10:47AM 20 the trial stage where you're asking, you know, what are the  
21 facts -- first, are there disputes of facts and then what are  
22 the facts and then applying the law to the facts, that is  
23 where the merits of the claim are dealt with and there really  
24 aren't any aspects of the merits of these claims that are  
10:48AM 25 different from one Class member to the next.

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10:48AM 1 Just quickly on the commonality for the Equal Protection  
2 and Title VI claims. The questions are similar as we saw for  
3 the Checkpoint Class: Did multiple tinted windows ticketing  
4 disproportionately impact Black and Latino drivers? Did City  
10:48AM 5 policymakers intentionally permit these practices to  
6 continue? And if they did, were those policymaker decisions  
7 motivated by race? Those are the key most important  
8 questions that we have to deal with in order to prevail on  
9 those Equal Protection claims. Again, those are questions  
10:49AM 10 that are going to be common to every Class member.  
11 In order to prove intent, we plan to present evidence,  
12 circumstantial evidence of intent of the type that the  
13 Supreme Court discusses in *Arlington Heights*, that includes  
14 the statistical disparities, that includes the historical  
10:49AM 15 context for these decisions -- and we have a social historian  
16 who can talk about some of that context. We would be talking  
17 about substantive departures from normal police procedures  
18 such as the lack of any public safety rationale for issuing  
19 multiple tickets when one ticket would essentially accomplish  
10:49AM 20 the same thing. And including the Commissioner Derenda's  
21 judgment that multiple ticketing was just something that  
22 officers did to, quote, pad their numbers. So those are all  
23 facts that play into the intent analysis. And, again, those  
24 are going to be common to every single Class member.  
10:50AM 25 And I'm going to be discussing the Gennaco Report more

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10:50AM 1 in terms of the Traffic Enforcement Class but this is an  
2 example of where some of our police practices experts  
3 findings are relevant to making that decision about intent.  
4 And the purpose of putting that report now at the Class

10:50AM 5 Certification stage is to demonstrate that his evidence  
6 common to every Class member. Each Class member can rely on  
7 that same expert report in the same way to prove their  
8 claims.

9 So, of course, for any damages Class, predominance under  
10:51AM 10 Rule 23(b) (3) is the critical factor. And in this case I  
11 think predominance is pretty easy because as we've discussed  
12 when talking about the common questions, all the liability  
13 questions are common and each Class member is going to be  
14 relying on the same body of evidence in order to establish  
10:51AM 15 liability.

16 So, under the checkpoints, things like the programmatic  
17 purpose of the checkpoints, the intent of the Commissioner in  
18 establishing checkpoint locations are common. The evidence  
19 of discriminatory practices for tinted windows ticketing and  
10:51AM 20 the decision to allow that discrimination to continue is  
21 common. And overtime incentives and the production  
22 incentives are common. So there really aren't liability  
23 questions that are going to be specific to any Class member.  
24 We don't need to determine whether any particular officers  
10:52AM 25 was actually biased because what we're looking at is whether

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10:52AM 1 the system was biased. And we don't need to determine  
2 whether there was probable cause or a discriminatory intent  
3 at the individual officer level because we're really focused  
4 on policies and practices and decisions that are coming from  
10:52AM 5 the policy level.

6 Is there -- no, okay, great. So moving on.

7 **THE COURT:** But I will tell both sides if you're going  
8 to do a PowerPoint, it's very helpful after we're done if you  
9 provide your PowerPoint to the Court. It's a good summary  
10:52AM 10 for me when I'm issuing a decision to make sure I've covered  
11 the points that you thought were the most important.

12 **MS. WILNER:** Yeah. And we have printed out copies so we  
13 can provide that and we have copies for the defense, as well,  
14 if they would like them.

10:53AM 15 So I know that the court has a lot of questions on  
16 damages. I want to start with really what I consider to be a  
17 Hornbook Rule in the Second Circuit that where liability is  
18 common, individualized damages are not going to defeat  
19 predominance. And I'm relying on *In re Nassau County Strip*  
10:53AM 20 *Search Cases* for this point but there's actually many, many  
21 cases in this Circuit that make the same point. A lot of the  
22 damages questions in this case, though, are common.

23 So I'll start with general damages which is something  
24 that we're seeking for unconstitutional detentions under the  
10:53AM 25 checkpoints and we're also seeking general damages for the

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10:54AM 1 personal degradation that's involved in racial  
2 discrimination.

3 So the Second Circuit has established this category of  
4 damages, general damages in *Kerman v. City of New York* and  
10:54AM 5 the idea behind general damages is that they are available  
6 "as a matter of law" once the constitutional violation is  
7 established, and that the damages are intended to compensate  
8 for the inherent nature of the constitutional harm. They are  
9 not meant to compensate for individualized damages like  
10:54AM 10 emotional distress, lost wages, any of that kind of thing  
11 that would have to be pleaded and proved up by each person.  
12 It's just --

13 **THE COURT:** So you are not seeking any personal injury  
14 damages?

10:55AM 15 **MS. WILNER:** I'm not saying that, your Honor, but I want  
16 to look at each of these categories separately so that we can  
17 look at the full scope of damages. And also what I think is  
18 really concerning you, which is how am I going to deal as a  
19 judge with all these damages and what is the jury going to be  
10:55AM 20 looking at?

21 **THE COURT:** Well, I have a different -- that is a  
22 problem but one of the issues is: It's your complaint --

23 **MS. WILNER:** Yeah.

24 **THE COURT:** -- you're the master. You get to decide  
10:55AM 25 what kind of damages you are seeking. And there used to be

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10:55AM 1 kind of a common method, oh, you can't have Class  
2 Certification for personal injury cases, it's just not a  
3 thing and the courts have said that's not really the rule,  
4 that's not how it works out.

10:55AM 5 But there are fairly few Class Certification cases with  
6 personal injuries that are, you know, non-economic. And, so,  
7 I am kind of surprised when arguably some of it is de  
8 minimis, why we're going down that path.

9 **MS. WILNER:** Yeah. I think...

10:56AM 10 **THE COURT:** I mean, it's your choice but it is a  
11 stumbling block which I could understand if somebody had  
12 catastrophic personal injuries like there's no way this isn't  
13 going to be a focus of our case. Here, if the generalized  
14 injury is you violated my Fourth Amendment rights and that is  
10:56AM 15 the core injury and everybody suffers that same injury --

16 **MS. WILNER:** Yes.

17 **THE COURT:** -- and you're not getting into the degree of  
18 outrage, that's a much different case than when we are  
19 hearing about the stress or -- I mean, I'm trying to think of  
10:56AM 20 what it could be other than emotional distress if you cover  
21 the economics.

22 So tell me a little bit about that.

23 **MS. WILNER:** Yeah. And from our perspective we don't  
24 think those kinds of damages are likely to be a significant  
10:57AM 25 feature. We're not actually aware of any unnamed Class



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10:57AM 1 members at this point who are planning to assert those kinds  
2 of damages and there may be --

3 **THE COURT:** But you decide what kind of damages the  
4 Class is going to assert with the Class representatives.

10:57AM 5 And, so, to tell the Court this far into the case at Class  
6 Certification that, you know, I don't know that the Class  
7 members are going to want to pursue this or not, it just kind  
8 of hangs out there and then thinking down the path, there  
9 will have to be some kind of management tool and we have the  
10:57AM 10 supplemental authority about do you decertify at that point,  
11 do you not do it, what do you handle with it?

12 And so, in light of how vague it sounds like this claim  
13 is at this point, I'm kind of perplexed as to why it's in the  
14 case. That's your business but it is creating an issue that  
10:58AM 15 needs to be resolved in terms of is this something that the  
16 Court could do in a Class setting?

17 **MS. WILNER:** Yeah. Well, if we look at all of the  
18 potential damages that there are in this Class, we're seeking  
19 general damages. We've also asked for punitive damages and  
10:58AM 20 equitable disgorgement, all of those are common forms of  
21 damages.

22 Then we are seeking recovery for economic harms. And  
23 the economic harms are going to be things like how much do  
24 people pay for checkpoint tickets or multiple tinted windows  
10:59AM 25 tickets. How much did they pay in impound fees and those

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10:59AM 1 damages are individual. But the city has data and records  
2 that already have the amounts calculated for every single  
3 Class member. So, even though those economic harms are  
4 individual, they're easily calculated and they're the type of  
10:59AM 5 individual damages that is very routine and commonplace  
6 probably in every damages Class Action.

7 So I would say like if you're, if you're looking at this  
8 as maybe an iceberg or a pyramid, the general damages and the  
9 other common damages and the economic harms are going to be  
10:59AM 10 most of that period and then very much at the tip of it is  
11 this prospect that some Class members may wish to seek  
12 individual -- other individual damages on top of that.

13 **THE COURT:** Okay.

14 **MS. WILNER:** Now --

11:00AM 15 **THE COURT:** So say that's going to happen and how is it  
16 going to happen. So you're going to have a proof of claim  
17 form and they're going to check off I want to pursue the  
18 following additional damages and then either the person or  
19 the entity that's sorting out the claims, or the Court  
11:00AM 20 itself, is going to say there's, you know, there's a thousand  
21 people who want additional damages, now I need two trials for  
22 those people, how is that going to work practically?

23 Because --

24 **MS. WILNER:** I --

11:00AM 25 **THE COURT:** -- it's troubling to me that you're like,

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11:00AM 1 well, they may be asserting these claims. It's your  
2 complaint. It's either in there or it's not.

3 **MS. WILNER:** You know, I think it's just really hard to  
4 tell from this vantage point what that will look like because  
11:01AM 5 we haven't had dispositive motions and we haven't had the  
6 trial. So we don't even know what are the claims that we  
7 will be seeking damages on.

8 **THE COURT:** You are in control of all of that. I mean,  
9 I've never had a Class Certification where the nature of  
11:01AM 10 damages is unknown this far into it. You have 99 percent of  
11 what you're asking for but you're not telling me -- and you  
12 don't need to say -- I'm giving up the 1 percent but the  
13 1 percent is what's going to cause the individualized trials  
14 and that's something the Court needs to be realistic about as  
11:01AM 15 to how is that going to work out.

16 **MS. WILNER:** Yeah. And, again, this is where I would  
17 say that that 1 percent of potential damages is like the tail  
18 wagging the dog of this entire Class Certification. And when  
19 we get to that point, if we get to that point, we can decide  
11:02AM 20 how to handle that category of damages. And there are a lot  
21 of options. So, there are -- is the possibility of dividing  
22 people into separate groups. There are Special Masters.  
23 Magistrates can be involved. Decertification is an option.  
24 So it's really, I think, going to depend on factors that we  
11:02AM 25 don't even know right now and it could be possible that

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11:02AM

1 nobody comes forward to --

2 **THE COURT:** Well, how are you --

3 **MS. WILNER:** -- assert --

4 **THE COURT:** Sorry, I didn't mean to jump on you,

11:03AM

5 especially for the court reporter.

6 How are you going to determine who's coming forward so  
7 it doesn't like -- when I said I was pragmatic, I am thinking  
8 about when am I going to know? Is it going to be when the  
9 claim form when you let me know? Because it's an issue in  
10 the case right now, something that the defendants are  
11 concerned about --

12 **MS. WILNER:** Yeah.

13 **THE COURT:** -- and the Court's concerned about it and  
14 when do you foresee this coming up? Because I don't see it  
15 coming up on summary judgment. I don't think that's the  
16 stage where somebody raises their hand in the air and says,  
17 by the way, I want to pursue a separate claim for myself on  
18 the following basis. Where do you see it coming up?

19 **MS. WILNER:** I think the claim form --

11:03AM

20 **THE COURT:** Okay.

21 **MS. WILNER:** -- would be where these issues would be  
22 fleshed out. And we have to remember that there's going to  
23 be general damages. People are going to be compensated for  
24 their economic harms. So how many people -- and there may be  
25 also, and this is something that we haven't discussed, but

11:03AM

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11:03AM 1 there may be types of harms that they can't be compensated  
2 for in this Class Certification because there's intervening  
3 causation so they're not entitled to it or whatever. We  
4 haven't gotten to the -- and maybe I messed up the case by  
11:04AM 5 bringing in more questions -- I hope not -- but I think the  
6 point is that it's, it's really too early right now to know  
7 the shape of it.

8 But through the claim form practice, through the claim  
9 form we should be able to have an idea of, you know, how many  
11:04AM 10 people are we talking about and what is it that they want to  
11 present. And we --

12 **THE COURT:** That's really not what happens with the  
13 claim form, though. So, I mean, I've never seen a claim form  
14 that asks potential Class participants after certification --  
11:04AM 15 because that's when it would come out -- what do you want to  
16 ask for. So, for example, in the dairy farmers. We had a  
17 formula based on milk weight and people provided records of  
18 how much milk they produced during a particular time period.  
19 There was a formula, this is how much you're entitled to.

11:05AM 20 And there was no, like, category "and what else would you  
21 like to complain about that the defendants are doing and seek  
22 recovery for". So, have you ever seen that in a claim form?

23 **MS. WILNER:** I'm not sure that I have.

24 Another potential option that we've thought about is  
11:05AM 25 including something in the notice process that would ask

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11:05AM 1 people to identify whether or not they thought that they  
2 would want to present this category of damages. So I think  
3 that there are a number of points in the process where it  
4 would be possible to identify whether this is even an issue.

11:05AM 5 **THE COURT:** Okay.

6 **MS. WILNER:** Are there other concerns about damages that  
7 have been troubling the Court? No.

8 Moving on, then, to the other piece of the 23(b) (3)  
9 discussion, the superiority analysis. As you know, there are  
11:06AM 10 a number of factors that go into the superiority analysis and  
11 we discussed many of them in our briefs.

12 I want to rely on our briefs for a lot of the  
13 superiority discussion but I do want to highlight the sheer  
14 number of Class members in this case because that, in and of  
11:06AM 15 itself, weighs in favor of certification. These -- we've got  
16 thousands of people who have identified virtually identical  
17 claims and having to litigate those claims one by one by one  
18 by one, I mean, that just doesn't make any sense. That would  
19 overwhelm the courts. That would overwhelm the city. It  
11:07AM 20 would probably overwhelm us, although, you know, we're  
21 willing to undertake it if we have to. And if there's no  
22 Class action, then the alternative to doing all of those  
23 thousands of trials one by one is just to leave thousands of  
24 harmed people with no redress for constitutional violations,  
11:07AM 25 and that's not an acceptable outcome, either.

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11:07AM 1 So just given the strong close association of all of  
2 these claims that are virtually the same as each other and  
3 the number of people who have these claims, the Class action  
4 is clearly the superior and the most efficient vehicle for  
11:07AM 5 resolving them.

6 We don't see significant management issues in this  
7 Class. Certainly with Class member identification, the  
8 process is nearly complete at this point, just a final step.  
9 And we think that the best way to proceed with the trial is  
11:08AM 10 to phase the trial. So, to begin with the jury determination  
11 of liability to the checkpoint and Tinted Windows Class  
12 members and have that same jury determine general damages  
13 afterwards if we prevail on those claims.

14 But I want to make sure that I have an opportunity to  
11:08AM 15 answer any additional management questions you have.

16 **THE COURT:** So management on all checkpoint-based claims  
17 seems relatively straightforward and easy. We have the dates  
18 and the times and the tickets.

19 And once you move beyond the checkpoints, then it gets a  
11:08AM 20 lot more amorphous and that's what I have been thinking about  
21 is when you take it into roving controls and you're  
22 essentially asserting the same claims and you have a due  
23 process component to it and it will be more difficult to see  
24 whether there's any -- that's where I'm kind of getting  
11:09AM 25 bogged down.

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11:09AM 1 **MS. WILNER:** I see. So the Tinted Windows Class is just  
2 as ascertainable as the checkpoints Class. And we have a  
3 spreadsheet that has on it a list of all of the people who  
4 received multiple tinted windows tickets in a single stop.

11:09AM 5 And so identifying the Class members is not going to be a  
6 difficulty. And then --

7 **THE COURT:** I guess I would just say it's almost a  
8 different case and it doesn't mean that you can't bring it  
9 but it is -- I understood the crux of the checkpoint, and  
11:09AM 10 even the crux of this case, is these checkpoints are targeted  
11 to certain neighborhoods and anybody going in or out is going  
12 to be detained and it's unconstitutional, it's not reasonable  
13 and then to add insult to injury, once they're detained, they  
14 get loaded up with traffic violations and it's incentivized  
11:10AM 15 and so they are bearing the burden of, you know, paying the  
16 overtime.

17 Once you move beyond that, it is a different type of  
18 claim which is, in general, what happens when you have tinted  
19 windows because obviously if you get stopped with tinted  
11:10AM 20 windows, the officer does not know the race of the driver.  
21 Then we look at the pinpoint of the stop and whether it's one  
22 ticket or two tickets or no tickets. And are they recording  
23 race in those stops?

24 **MS. WILNER:** No, they did not record race in those  
11:10AM 25 stops.



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11:10AM 1           **THE COURT:** So you're doing it on the back-end based on  
2 the tickets, right? So --

3           **MS. WILNER:** Yes.

4           **THE COURT:** -- how would you eliminate people who were  
11:11AM 5 stopped and not given a ticket and the officer says you got  
6 to take care of that?

7           **MS. WILNER:** The Tinted Windows Class -- and maybe let  
8 me just go back to the Class definition is defined as: All  
9 Black and/or Latino individuals who received multiple tinted  
11:11AM 10 windows tickets from the BPD in a single traffic stop on or  
11 after June 28, 2015.

12           So people who were stopped but were not issued a ticket  
13 are not members of the Tinted Windows Class.

14           **THE COURT:** Right. But I'm trying to figure out how  
11:11AM 15 that determination gets made when you're telling me that the  
16 race of the driver's not recorded. There's no record of  
17 people who were stopped but weren't ticketed and the argument  
18 is that you couldn't be stopping these people based on race  
19 because you can't see through the tinted windows. And  
11:12AM 20 that -- I think that's a very different claim than your  
21 checkpoint claim.

22           So then I'm into a more of a management in terms of is  
23 this even a Class or is this -- if you had a policy that said  
24 this is what we're trying to accomplish with tinted windows,  
11:12AM 25 then it could be directed at the policy but I don't see it as

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11:12AM 1 that black and white in terms of what the policy says.

2 **MS. WILNER:** Okay. So, I think there are a few layers  
3 here that I'd like to respond to.

4 First of all, your -- I agreed with your description of  
11:12AM 5 the Checkpoints Class but the behavior that you were talking  
6 about, the targeting of Black and Latino communities and  
7 people for traffic enforcement and ticketing wasn't limited  
8 to checkpoints. So the same officers who are doing those  
9 checkpoints were also going to those same neighborhoods where  
11:13AM 10 the checkpoints were being run and engaging in multiple  
11 tinted windows ticketing there. And those -- many of those  
12 same practices are still continuing today and that's the  
13 focus of the injunctive claims for the Traffic Enforcement  
14 Class. And I definitely I know that the Court has concerns  
11:13AM 15 about that Class so I want to discuss that a lot.

16 So there is a spectrum and a pattern of behavior here.  
17 From all of that spectrum and pattern of behavior for the  
18 damages Class, we selected out two groups of people whose  
19 claims could and should be litigated together because they  
11:13AM 20 are so similar and they all experienced the same harm and  
21 that's people who are harmed by checkpoints and Black and  
22 Latino individuals were harmed by multiple tinted windows  
23 ticketing.

24 Now I do want to say that once the officer stops the car  
11:14AM 25 and sees the driver and is issuing a tinted windows ticket,

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11:14AM

1 that officer does see the race of the driver.

2 **THE COURT:** Agreed. But they if they don't record it,  
3 we have no way of knowing.

11:14AM

4 **MS. WILNER:** Oh, I see. Well, the City does, actually  
5 does --

6 **THE COURT:** I just asked you if they did and you said  
7 they didn't so.

11:14AM

8 **MS. WILNER:** Well, so, it's not quite so  
9 straightforward. The Buffalo Police Department does not  
10 require officers to record on the race of -- on the ticket,  
11 itself, the race of the person being ticketed. They could do  
12 that but they don't do that. So it's not on the ticket.  
13 But --

11:14AM

14 **THE COURT:** Nor could it be because you wouldn't be able  
15 to discern the race without asking a lot of nosy  
16 inappropriate questions. Always -- I mean, you couldn't  
17 always do that.

11:15AM

18 **MS. WILNER:** Right. Well, what our police practices  
19 expert has said about that is what officers should do is  
20 record their perceived -- their impression or their  
21 perception of what the person's race is and that what you're  
22 actually wanting to do is in that instance is have a record  
23 of officers' perceptions. That's really for the second  
24 claim, again, the traffic enforcement claim.

11:15AM

25 But City data actually has matched many of the tickets

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11:15AM 1 to a race because the TraCS system in which -- the tickets  
2 are in the system called TraCS but TraCS is a part of a  
3 larger system that includes everything that the Buffalo  
4 Police Department does and that system is called CHARMS. And  
11:16AM 5 CHARMS actually has a lot of race data in it from other  
6 situations in which people encountered the justice system and  
7 their race was recorded in those other areas because while  
8 race is not typically recorded for traffic violations, it is  
9 recorded for misdemeanors and other types of encounters that  
11:16AM 10 people have with the criminal system.

11 So, in fact, you can go on the city of Buffalo's website  
12 and you can go into their data portal and you can download  
13 traffic tickets and it has a field in it for the race of the  
14 person ticketed and that race is populated most of the time.

11:16AM 15 What our data -- and I don't want to go into too much  
16 detail on this because I'm worried I'll get it wrong -- but  
17 if you look in Dr. Bjerk's report, he used that City data.  
18 But he also had another method of assigning race to  
19 individuals. I don't want to go too much into detail with it  
11:17AM 20 but it is explained in a lot of detail. And the two ways  
21 that he did it matched each other.

22 And, so, we are very confident that we are able to if --  
23 going back to the question of manageability -- that we are  
24 able to identify the race of Class members based on the data  
11:17AM 25 that the City has in its possession. And, of course, if

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11:17AM 1 there is a claim form process and if there is a question  
2 about a particular individual, it can always be clarified at  
3 the proof of claim stage whether or not a person actually is  
4 a member of the defined Class. And, of course, that's  
11:18AM 5 something that has to happen regardless.

6 I'm not sure if I was able to, if I, if I got to  
7 answering all of your questions about the manageability of  
8 this Class.

9 **THE COURT:** Let's move on. Yes, you have.

11:18AM 10 **MS. WILNER:** Okay. So let's talk about the Traffic  
11 Enforcement Class. And I appreciate your Honor sharing your  
12 hesitations and my job is to clear up those hesitations.

13 This is a very different kind of Class because this  
14 Class is not seeking damages for past times. We are seeking  
11:18AM 15 declaratory and injunctive relief for ongoing and future  
16 violations. So this is a forward-looking Class. And the  
17 certification is under Rule 23(b)(2). And so the focus of  
18 this Class is on the policies and the practices of the  
19 Buffalo Police Department.

11:19AM 20 And it is a broader Class definition. But it's okay  
21 that it's a broader Class definition because the policies and  
22 practices that are at stake affect a broader group of people.

23 And the injunctive relief that we're ultimately asking  
24 for is going to affect and benefit all of that group of  
11:19AM 25 people. And there's no particular individualized relief that

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11:19AM 1 people would be getting as part of this Class. This is about  
2 addressing systemic problems with policies and practices of  
3 the police department. And --

11:20AM 4 **THE COURT:** Do you see a significant difference between  
5 the declaratory component and the injunctive component so  
6 saying you can't do X, Y or Z that it's a violation of the  
7 Fourth Amendment is one thing. Enjoining future behavior  
8 based on predicting future events is a different task.

9 Do you see the -- do you make that distinction yourself?

11:20AM 10 **MS. WILNER:** Yes, I do. They are very different.

11 The standing requirements are the same for the two forms  
12 of relief but saying that a constitutional -- that the  
13 Constitution has been violated and directing changes in  
14 behavior to address the constitutional violation are two  
11:20AM 15 different things.

16 But that kind of redress for constitutional violations  
17 is commonly done by courts all across the country and in  
18 New York. And we've cited probably six or seven examples in  
19 our brief of similar claims for unconstitutional policing  
11:21AM 20 practices where courts have redressed those policing  
21 practices with injunctive relief and those cases also had  
22 similar definitions to the definition in our case.

23 So this is a large Class. A lot of people are affected  
24 by traffic enforcement in the city of Buffalo and because it  
11:21AM 25 is prospective, the Class is going to include in it future

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11:21AM 1 members. That's just a nature of the (b)(2) certification  
2 always. And so, again, no issues with numerosity.

3 And, in fact, in its brief, the City conceded all of the  
4 23(a) factors for this Traffic Enforcement Class including --

11:22AM 5 **THE COURT:** Whether the City challenges or the  
6 defendants challenge numerosity for any of the Classes?

7 **MS. WILNER:** They didn't. They didn't. And for this  
8 Class they didn't challenge commonality or typicality or  
9 adequacy, for that matter.

11:22AM 10 But commonality is really important for any (b)(2)  
11 certification because if the Court is going to be issuing an  
12 injunction, it has to insure that it's addressing the same  
13 harms and in this case the court would be --

14 **THE COURT:** Why does the Court need to have a separate  
11:22AM 15 Traffic Enforcement Class? So, I do think the standing  
16 requirement is different in terms of an injunction. There  
17 needs to be a possibility of a injury that's not shared by  
18 the general public and I think that I could order injunctive  
19 relief without this Class for the other Classes.

11:23AM 20 **MS. WILNER:** I don't believe that's correct, your Honor.

21 **THE COURT:** So, if I find, or the jury finds, a  
22 violation of the Fourth Amendment and I would have to find  
23 that there was some form of prospective harm but I would not  
24 need a separate Class to do that.

11:23AM 25 **MS. WILNER:** I, I think you may, your Honor. I think

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11:23AM 1 you may need the separate Class for the prospective  
2 injunctive relief because.

3 **THE COURT:** So, for example, I'll go back to the dairy  
4 farmers. You can't do this particular monopsony practice any  
11:23AM 5 more and you're not allowed to tie compensation to X, Y and Z  
6 any more. You don't need a separate Class for that.

7 **MS. WILNER:** Mm-mm. Well, what I would say to that,  
8 your Honor, is the, the checkpoints Class and the Tinted  
9 Windows Class are seeking damages for two very specific, very  
11:24AM 10 tightly bound policies and practices and the reason for that  
11 is because looking at the predominance requirement under  
12 (b) (3), the Class has to be very unified in that way in order  
13 for the common questions to predominant over the individual  
14 issues.

11:24AM 15 But in the (b) (2) universe there is no requirement that  
16 common questions predominate over individual issues. All you  
17 need is a common question. And the unlawful behavior that  
18 the BPD is currently engaged in is broader than checkpoints  
19 and tinted windows. It is happening in the same  
11:25AM 20 neighborhoods. It's happening to the same people. So, the  
21 Class of Black and Latino drivers in Buffalo is still being  
22 harmed by racially discriminatory traffic stops, racial  
23 profiling, ticketing. And that is why injunctive relief is  
24 necessary.

11:25AM 25 So the common questions that we're looking at for this



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11:25AM 1 Traffic Enforcement Class is whether the City today is  
2 continuing to engage in racially discriminatory traffic  
3 enforcement and, if so, whether the City's deliberate  
4 indifference to that ongoing discrimination has caused

11:25AM 5 practices to continue. And we've included in this also  
6 injunctive relief for the Checkpoints and Tinted Windows  
7 Class.

8 I suppose if the preference is to handle, you know,  
9 those components, you know, as part of the (b) (3)  
11:26AM 10 certification, I don't really have an issue with that.

11 But in terms of the ongoing racial discrimination, we  
12 are asking for injunctive relief to correct that harm. And  
13 the question of whether discrimination is happening and  
14 whether it is a policy or practice of the City of Buffalo,  
11:26AM 15 those questions are important common questions that every  
16 single Class member has had.

17 And you had asked about the relevance of the Gennaco  
18 Report. The Gennaco Report is really critical evidence of  
19 discriminatory intent and ongoing discrimination. So, we  
11:27AM 20 have a lot of evidence that we intend to present at trial to  
21 establish that racial discrimination in traffic enforcement  
22 is a current, ongoing practice.

23 **THE COURT:** But you would agree with me that's not a  
24 question I reach in Class Certification? So I don't need to  
11:27AM 25 find that they're not doing a good job training the officers

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11:27AM 1 and they're not doing a good job in responding to complaints.  
2 None of that is something that I'm going to be inquiring  
3 about right now.

4 **MS. WILNER:** No. You are going to just be inquiring  
11:27AM 5 about whether that question is common to all of the Class  
6 members. And the Gennaco Report supports that it is and it  
7 also supports the common nature of the proof that all of the  
8 Class members are able to rely on the same body of evidence  
9 in order to establish their claims. So that's really the  
11:27AM 10 relevance of the report at the Class Certification stage.

11 **THE COURT:** Okay.

12 **MS. WILNER:** In terms of standing, which defendants have  
13 challenged, the law in the Second Circuit is that only one  
14 named plaintiff needs to have standing in order for the Class  
11:28AM 15 Certification to proceed. Now, of course, we believe that  
16 all of our named plaintiffs have standing. They're in the  
17 same position as each other. They have the same claims as  
18 each other.

19 What the courts have said is that when individual  
11:28AM 20 plaintiffs in police discrimination or unconstitutional  
21 policing case like this, when they have faced repeated past  
22 incidents and that there's also an official policy, or an  
23 equivalent, that those two things together create standing  
24 for prospective relief.

11:28AM 25 And we meet that standard, your Honor. All of our named

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11:28AM 1 plaintiffs have described at least one incident where they  
2 believe they were subjected to racial discriminatory traffic  
3 enforcement. Many of them have talked about more than one  
4 time when they believe they have suffered discrimination in  
11:29AM 5 traffic enforcement from the BPD.

6 There is compelling evidence that we plan to submit  
7 around statistical disparities, around racial animus within  
8 the Buffalo Police Department, around the mayor's admissions  
9 to the Menino Survey of theirs that BPD officers treat white  
11:29AM 10 people somewhat better than black people and that racism on  
11 the police force is partially responsible for police violence  
12 in Buffalo. So -- and we have a lot of other evidence that's  
13 similar.

14 The really critical piece of the Gennaco Report is that  
11:30AM 15 it underscores the City's policymakers' responsibility for  
16 this situation. Because discrimination is happening and the  
17 City is not correcting it. They are not supervising  
18 officers. They are not monitoring. They're investigation  
19 process is broken. It is an unbelievable Catch-22 where the  
11:30AM 20 commissioners say that the only thing they can do to address  
21 discrimination is to adjudicate individual complaints that  
22 people file with the Internal Affairs Department but then the  
23 Internal Affairs Department's procedures are so lacking and  
24 so far beyond any standard, that they're incapable of  
11:30AM 25 assessing whether discrimination is occurring.

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11:30AM 1 The City has refused to collect data or look at data  
2 that could help to elucidate this. They are not supervising  
3 their officers. They're not auditing. They're not -- the  
4 body camera footage that they agreed that they're not going  
11:31AM 5 to look at to see if officers are treating people with  
6 respect or treating people in a non-discriminatory manner.  
7 And, so, those 120 pages or whatever it is of the  
8 Gennaco Report records in detail all of the ways that the  
9 policymakers within the City of Buffalo have failed to do  
11:31AM 10 anything -- anything -- to identify and address and correct  
11 ongoing racial discrimination. And that gives rise to  
12 liability under Monell. And that is also an official policy  
13 that provides the basis for standing. I will refer the Court  
14 to our briefs but we cited a number of very similar cases  
11:32AM 15 where courts have found that they had standing to bring  
16 claims for prospective injunctive relief.  
17 And then -- well, let me just stop here. Are there  
18 questions remaining in your mind on standing?  
19 **THE COURT:** There's questions remaining but you helped  
11:32AM 20 my questions and you answered with your answers.  
21 **MS. WILNER:** Thank you.  
22 Then you had also asked about the injunctive relief and  
23 although I don't have it handy, so I'm going to refer the  
24 Court to the amended complaint. The amended complaint sets  
11:32AM 25 out specific relief that we would be asking the Court to

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11:32AM 1 order. And the types of relief that we're asking for are  
2 types of relief that are very commonly ordered in other  
3 cases. So whether it's collecting race data for people who  
4 are ticketed and then actually being able to look at that  
11:33AM 5 data, whether it's improving training for officers, there are  
6 some specific things that we've asked for such as not running  
7 the checkpoints anymore, and ending the multiple tinted  
8 windows ticketing practices.

9 But it's really about changing the policies and  
11:33AM 10 practices of the Buffalo Police Department so that it is  
11 possible for the police department to meet its constitutional  
12 obligations which is to identify when racial discrimination  
13 is occurring and to take the steps that it needs to prevent  
14 it. And it's not to say that the City has to -- and I don't  
11:33AM 15 think it can -- prevent 100 percent of every incident from  
16 ever occurring but the City has to have policies and  
17 practices in place to address the situation. It can't just,  
18 you know, put its head in the sand and allow discrimination  
19 to continue and to say, oh, I didn't, I didn't know about it.  
11:34AM 20 I've buried my head in the sand, I've chosen not to look and,  
21 therefore, I don't have to do anything, that's not the way  
22 the ball works and that's --

23 **THE COURT:** The City --

24 **MS. WILNER:** -- not what the Constitution demands.

11:34AM 25 **THE COURT:** If the City said we are going to stop all

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11:34AM 1 checkpoints except DUI checkpoints and we're going to have a  
2 policy that if you issue a tinted window violation, you can  
3 only issue one, how much of your injunctive relief -- other  
4 than general don't violate the Fourth Amendment -- how much  
11:34AM 5 of your injunctive relief would go by the wayside?

6 **MS. WILNER:** I don't think very much, your Honor,  
7 because a really important part of this Class is the fact  
8 that the Buffalo Police Department is continuing to engage in  
9 racial profiling with stops and with tickets. And, so, it's  
11:35AM 10 extremely important that there be changes to monitoring  
11 supervision and discipline of officers to prevent that racial  
12 profiling and racially-motivated stops and ticketing from  
13 continuing. And that's not relief that really flows from  
14 either of the Checkpoints Class or the Tinted Windows Class.  
11:35AM 15 It's really broader and it's about practices that are  
16 happening now.

17 **THE COURT:** So --

18 **MS. WILNER:** And prac --

19 **THE COURT:** So getting back to the pragmatic.

11:35AM 20 **MS. WILNER:** Yeah.

21 **THE COURT:** And you know that if the Court issues an  
22 injunction, it has to be very specific --

23 **MS. WILNER:** Yeah.

24 **THE COURT:** -- as to who it's directed to and what's  
11:36AM 25 necessary and it can't be just comply with the Fourth

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11:36AM 1 Amendment.

2 **MS. WILNER:** Right.

3 **THE COURT:** And it can't be: Adopt appropriate measures  
4 to insure that documentation of all civil traffic stops and  
11:36AM 5 vehicle checkpoints is retained.

6 I mean, it has to be very, very specific.

7 **MS. WILNER:** Yeah. So, this is not something that --  
8 it's in our briefing but I can tell you that's the main thing  
9 that our organization does is these kinds of civil rights  
11:36AM 10 Class Actions seeking injunctive relief to reform complex  
11 governmental systems so that they comply with the  
12 Constitution and the law.

13 And so the way that that normally happens there's a  
14 couple of paths. One is that we could get to a point where  
11:36AM 15 the defendants and we agree that there is a problem and  
16 sometimes this doesn't happen until after the liability  
17 issues have determined but once -- it's very common that  
18 there is then a collaborative process between the parties and  
19 the Court to determine the shape of the injunction that's  
11:37AM 20 eventually issued.

21 **THE COURT:** Well, that's why --

22 **MS. WILNER:** I --

23 **THE COURT:** -- I asked if they disavow future  
24 checkpoints and they say no tinted window tickets beyond one,  
11:37AM 25 how much of that takes care of that.

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11:37AM 1 But I'm understanding you to say you're looking for much  
2 broader reforms?

3 **MS. WILNER:** That's correct. So that really wouldn't --  
4 that would not provide adequate relief to our Class but what  
11:37AM 5 the relief would be, there has to be a lot more detailed  
6 conversation about that. So, sometimes the courts will ask  
7 each side to make a detailed proposal. There can be  
8 hearings. There can be presentation of evidence. In the  
9 *Floyd* case -- which was the New York City stop and frisk

11:38AM 10 case -- there was a lot of testimony and presentation and a  
11 very detailed injunctive plan that the judge issued after  
12 taking in all the evidence from both sides.

13 So there's different ways that courts handle this. But  
14 you have to be able to hear from both sides because there is  
11:38AM 15 information that we have from our clients' experience and  
16 there's information that the defendants have from, on their  
17 side, from their administrative oversight of policing. And  
18 an injunction is only effective when both sides are able to  
19 provide that information to the Court and then relief is

11:38AM 20 fashioned to address the specific practices that are causing  
21 the harm.

22 And usually there are also a series of benchmarks or  
23 goals that we would meet or expectations that have to be met  
24 in order to determine whether the injunctive relief is  
11:39AM 25 achieving the goal of ending the constitutional violation.



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11:39AM 1 So it is a step-by-step process but it's one that courts do  
2 frequently.

3 I think I'll conclude and step down, your Honor. Thank  
4 you.

11:39AM 5 **THE COURT:** All right. Let's start with defendants.  
6 We've got about a little shy of a half hour before noon. I'm  
7 happy to break later if you want but I want to give you equal  
8 opportunity. So however long you want to take, I will be  
9 here.

11:39AM 10 **MR. RUSS:** Thank you, your Honor.

11 I don't intend on taking that long unless it's to answer  
12 your questions.

13 Thank you. And may it please the Court.

14 Before I get started, I wanted to thank the Court for  
11:40AM 15 coming from Vermont, for bringing her staff from Vermont. I  
16 know it's out of the ordinary and we truly appreciate it.

17 I guess the best we could do for you is to get some  
18 green marble.

19 **THE COURT:** That does look like Vermont marble.

11:40AM 20 **MR. RUSS:** Also, your Honor, congratulations. I  
21 understand that you are now chief.

22 **THE COURT:** For the second time, yes.

23 **MR. RUSS:** And I'm sorry that I have no PowerPoint. I  
24 have no real excuse other than I'm kind of a dinosaur.

11:40AM 25 I'm going to go, actually, backwards. I'm more

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11:40AM 1 concerned with addressing the Court's musings than I am  
2 making a formal argument. So what I will try to do is  
3 address some of the musings that you have made and then if  
4 there's something left, I'll do a formal argument.

11:41AM 5 But just before I address the musings, I feel compelled  
6 to say two things: Even though we are talking about  
7 discriminatory practices and, you know, for purposes of this  
8 motion, we are talking about discriminatory practices and  
9 discriminatory policies, the City defendants, and in  
11:41AM 10 particular the Mayor and the Former Mayor, do not concede  
11 discrimination. It's difficult for me to imagine that our  
12 Mayor, who just stepped down last week, had been mayor for 19  
13 plus years and is Black and one of the police commissioners  
14 involved during the timeframe of this case is Black, and a  
11:42AM 15 number of the police officers involved are Black, it's just  
16 difficult to conceive that the kind of discriminatory animus  
17 that plaintiffs recite existed.

18 And the other thing I feel compelled to say, your Honor,  
19 is that you had asked for some background on the checkpoints  
11:42AM 20 and how they operated.

21 **THE COURT:** But you would, you would agree with me,  
22 women discriminate against women, people over the age of 40  
23 can discriminate against other people over the age of 40. I  
24 mean, there isn't any preclusion that just because you are a  
11:42AM 25 member of the alleged targeted Class, that categorically you

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11:42AM 1 couldn't be engaged in discrimination?

2 **MR. RUSS:** I do concede that, your Honor. However, I  
3 state that the way it's been framed in this case is this vast  
4 conspiracy and in order for plaintiffs' claims to be  
11:43AM 5 believed, all kinds of people were working together to erect  
6 the system and carry out this process and it's just, it's not  
7 supported by the evidence.

8 The second thing that the Court should know -- and this  
9 is about the checkpoints. You had asked to explain how they  
11:43AM 10 worked and how they operated. Well, plaintiffs left out the  
11 start. The checkpoints started when the East Side of  
12 Buffalo -- which I will stipulate is predominantly Black and  
13 has been since the 1940s -- the east side of Buffalo through  
14 public meetings, many at churches, others at community  
11:43AM 15 centers asked the mayor and the police department for a  
16 greater police presence on the East Side.

17 And the first -- the first and motivating principle of  
18 the checkpoints was traffic safety. There were reports that  
19 cars were racing through the East Side and bad things were  
11:44AM 20 happening with cars and we had to do something about the  
21 traffic on the East Side. That was the start of everything.  
22 So, I mostly agree with plaintiff's recitation of how the  
23 checkpoints operated, at least the factual part, but it  
24 started with a request from the community for a greater  
11:44AM 25 police presence. Okay.

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11:44AM 1 Your musings. Your first musing was you asked us to  
2 discuss summary judgment and how summary judgment might fit  
3 into this process.

4 **THE COURT:** Do you mind if I stop you --

11:44AM 5 **MR. RUSS:** Sure.

6 **THE COURT:** -- and go back to -- assume that I, you  
7 know, for the sake of argument, that your recitation about  
8 how they work and why they were set up works. I'm trying to  
9 understand in Fourth Amendment reasonableness terms. So,  
11:45AM 10 there's a request for a police presence, you start these  
11 checkpoints, the checkpoints, I assume based on what I've  
12 read, were for public safety not, not so much people are  
13 driving too fast but somebody's going to get killed or to get  
14 people who have outstanding warrants, that kind of thing.

11:45AM 15 Then what's the thought process with the traffic tickets  
16 coming out of it? How does that get factored into it?  
17 Because whether somebody has tinted windows or not doesn't  
18 have anything to do with how fast they're driving or how  
19 recklessly they're driving and it doesn't have anything to do  
11:45AM 20 with whether there's an outstanding warrant or there is an  
21 unlicensed firearm in the car or the person's a felon or  
22 anything else like that. So what's that step about?

23 **MR. RUSS:** So, I think you put your finger on it, your  
24 Honor, when you were talking about safety. If you just stop  
11:46AM 25 people and let everyone go with no consequences, what's the,

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11:46AM 1 what's the deterrent or what's the remedy for the, for the  
2 neighborhood? But if in during the stop you find that there  
3 are -- you have probable cause, you find that there are  
4 violations, and then you issue tickets for those violations,  
11:46AM 5 I think that goes to the purpose of stopping the problem  
6 traffic.

7 **THE COURT:** Okay. I can --

8 **MR. RUSS:** In other words if you just stop.

9 **THE COURT:** No, I understand the consequent part.

11:46AM 10 But to me it sounds a fair amount like stop and frisk,  
11 where the policy is you're going in, you're going to get  
12 stopped and you're going to get frisked. Everybody's going  
13 to go in. So it creates an incentive don't come in with a  
14 gun, don't come in with drugs because this is going to happen  
11:47AM 15 to you every time you go into the City. And I'm not seeing  
16 any kind of concession by the City that that's what this is.

17 And, so, if it's general crime -- or I would say violent  
18 crime, then it doesn't seem to make sense to issue the  
19 traffic violations and if it's only about traffic

11:47AM 20 enforcement, it seems like overkill in that you would have,  
21 you know, a secondary inspection and you would be stopping  
22 people on their way to work and to the grocery store and back  
23 from school because of an unregistered vehicle or suspended  
24 license. And, as I said, it doesn't really seem to make any  
11:47AM 25 difference whether somebody's got a registered vehicle in

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11:48AM 1 terms of how careful they drive. In fact, they might drive  
2 more carefully because they don't want to get stopped and  
3 have the lack of registration be found.

4 So, that's the step I'm missing in terms of how does  
11:48AM 5 this make sense in any kind of objection, you know, and I use  
6 the example in my musings of there was a shooting on this  
7 particular corner last night, let's get a traffic checkpoint  
8 there the next day. To do what? To show a police presence?  
9 Okay, that's one thing. But to garner evidence of that  
11:48AM 10 crime, it's probably too late for that. So that's where I'm  
11 stopped.

12 **MR. RUSS:** Yeah, I think you said Broadway and  
13 somewhere.

14 **THE COURT:** Fillmore or something.

11:48AM 15 **MR. RUSS:** Let me try three answers to that because I  
16 can never do just one. First one, it is not a stop and frisk  
17 or it's not like a stop and frisk because not everyone is  
18 detained.

19 **THE COURT:** Well they're all initially detained.

11:49AM 20 **MR. RUSS:** They're all stopped.

21 **THE COURT:** Right.

22 **MR. RUSS:** But it could be two seconds and they're  
23 going.

24 **THE COURT:** But we would agree that that stop is a  
11:49AM 25 detention. Whether it violates the Fourth Amendment or not,

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11:49AM 1 it's a seizure.

2 **MR. RUSS:** I agree that the stop is a detention. I  
3 don't think it's a stop and frisk because it's not applied to  
4 everyone single person no matter what.

11:49AM 5 **THE COURT:** Well let me ask: Everybody going through  
6 that checkpoint has to stop. So it's not like a -- it's not  
7 even like a DUI checkpoint where they're like we're going to  
8 stop every fourth car, everybody gets stopped, correct?

9 **MR. RUSS:** Yes, your Honor. But some get waved right  
11:49AM 10 through so that the stop is a matter of seconds.

11 The second thing I was going to say, your Honor, is that  
12 your own description of the deterrence was, oh, I'm going to  
13 get stopped and I'm going to get a ticket for such and such  
14 and so and so. That's the deterrence.

11:50AM 15 **THE COURT:** Okay.

16 **MR. RUSS:** Even you --

17 **THE COURT:** Okay.

18 **MR. RUSS:** Even you said that.

19 And the third-- I'm getting old. I can't remember. If  
11:50AM 20 it comes back to me, I'll say it. But...

21 **THE COURT:** Well I was asking about how would it help  
22 after a crime. Does that prompt you?

23 **MR. RUSS:** Oh, you did ask that. And what I was going  
24 to say -- and I'm not exactly articulate on this, I  
11:50AM 25 understand, but because checkpoints may be inartfully set up

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11:50AM 1 or set up in sort of some, perhaps, questionable locations,  
2 that doesn't mean they're set up for discriminatory purposes  
3 and it doesn't mean that because they are set up in certain  
4 places, that, you know, automatically there's this violation  
11:51AM 5 of the Fourth Amendment.

6 **THE COURT:** Agreed.

7 **MR. RUSS:** Bad judgment is not a violation of the Fourth  
8 Amendment, I don't think.

9 You had asked about summary judgment and how does it fit  
11:51AM 10 in. I understand that Class Actions are complicated and  
11 motion heavy. But I just don't see summary judgment here at  
12 all on anything, even the most basic issue were our practices  
13 discriminatory? We're going to say no, they're going to say  
14 yes. That's a question of fact. And that's before you get  
11:51AM 15 to any individual concerns. And I just, I just -- I don't  
16 know how.

17 **THE COURT:** Well, there's a robust body of law on the  
18 Fourth Amendment as to when you can stop people and when you  
19 cannot. And if there isn't a special need and, you know, the  
11:52AM 20 best example is the DUI checkpoints which are generally, if  
21 they're handled well, are deemed constitutional. I'll be  
22 looking at other checkpoints. I mean, the border's kind of  
23 not a good example because of the heightened ability of law  
24 enforcement near the proximity of the border. But there's  
11:52AM 25 plenty of cases about doing that too far from the border and



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11:52AM 1 what happens to the analysis under the Fourth Amendment if  
2 you're not in close proximity to the border. But you're in  
3 Montpelier, Vermont and you're checking cars to see if  
4 somebody is in the country without status. So it's not like  
11:52AM 5 it couldn't be resolved on summary judgment.

6 **MR. RUSS:** I agree with you in theory, your Honor. And  
7 if this were, you know, one checkpoint or one week or one set  
8 of checkpoints, then maybe that you can determine whether  
9 that would violate the Fourth Amendment. But you have  
11:53AM 10 hundreds here. And then within those checkpoints, you have  
11 potentially hundreds of stops. So I just --

12 **THE COURT:** But maybe if I could resolve nothing on  
13 summary judgment, so be it. Do you think that that's kind of  
14 a pivot point for Class Certification?

11:53AM 15 **MR. RUSS:** The Fourth Amendment claims?

16 **THE COURT:** No. I mean, whether I can -- I wanted you  
17 to be pragmatic and you're being pragmatic for me by saying  
18 you're right, this is not something we can just do on summary  
19 judgment, we're going to have to have a trial and that's  
11:54AM 20 fine. But that's not much of a pivot point for Class  
21 Certification or not, would you agree with me?

22 **MR. RUSS:** I would agree with you but I was endeavoring  
23 to answer the Court's first question, first musing.

24 **THE COURT:** Okay. So you think this is not a case in  
11:54AM 25 which --

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11:54AM

1       **MR. RUSS:** No.

2       **THE COURT:** -- we can do it?

3       **MR. RUSS:** No.

4       **THE COURT:** Okay.

11:54AM

5       **MR. RUSS:** And I'll go further, your Honor. I've had

6 Class actions where -- that I've defended where we -- and

7 maybe your dairy farmer one was like this -- where you can

8 kind of whittle things down but I just don't see that here.

9       You mused about general damages. There may be some

11:54AM

10 questions of general damages here but it's virtually all

11 individual. And the most obvious element or the most obvious

12 example of that is, okay, each of these claimants states that

13 my Fourth Amendment rights were violated. Well, how does

14 that affect that person? What did that cause? How did they

11:55AM

15 feel? Did they have job consequences? Did they have

16 financial consequences? All that, all those individual kind

17 of questions -- which I'll talk more about -- I think so far

18 outweigh any notion of general damages.

19       The second thing I would say, your Honor --

11:55AM

20       **THE COURT:** Well, let me stop you on that point. Do you

21 agree -- and the plaintiffs didn't so you don't have to worry

22 about it -- they could do away with all of that, they could

23 say all we're seeking is general damages and we weren't

24 looking for any individualized harm recovery other than this

11:55AM

25 economic component which they say we can easily determine

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11:55AM 1 because we've got the records of how many tickets and who  
2 they went to and how much they paid and what the impound fees  
3 were, they could do away with the whole question of how in  
4 particular was your Fourth Amendment violation for you?

11:56AM 5 **MR. RUSS:** I agree with that, your Honor, but I don't  
6 see that coming.

7 **THE COURT:** It's not coming to.

8 **MR. RUSS:** And I think -- I'm sorry to refer to your  
9 dairy farmer case -- but you had mentioned, you had started  
11:56AM 10 to describe damages on that based on the weight of the milk  
11 and the volume, whatever. You know, that's a case where  
12 there's a formula. And at least as it's pled now, there's no  
13 formula. Everything's individual.

14 You had asked about the Traffic Enforcement Class and I  
11:56AM 15 know you asked counsel a bunch of questions and I don't  
16 necessarily want to repeat those. But what I'd like to add,  
17 your Honor is a couple things.

18 You did note that the City has stopped doing these  
19 checkpoints and the current Commissioner of Police, Joseph  
11:57AM 20 Gramaglia testified under oath that they're stopped, there's  
21 no future intent to do them.

22 But I feel -- this is maybe a little obnoxious and I  
23 apologize -- but I feel as if plaintiffs don't really know  
24 what they want. And I feel, I feel like it's, you know,  
11:57AM 25 Donald Trump being asked what he's going to do and he says,

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11:57AM 1 well, I have a concept of a plan. That means you don't have  
2 a plan. And I don't think that they know. What is the  
3 injunctive relief? Don't violate the law? You know, don't  
4 violate the Fourth Amendment? I just -- I don't see it.

11:57AM 5 **THE COURT:** Well, let me ask you about the Traffic  
6 Enforcement Class, obviously the one the Court has the  
7 biggest problem with, and especially the injunctive relief  
8 component. And there is a body of law that's recent from the  
9 Second Circuit that talks about you can't just say, well,

11:58AM 10 Commissioner Jane says she's not going to have -- she's got  
11 no plans for another checkpoint and that's enough to take  
12 care of the injury because somebody else can say I'd, you  
13 know, change that policy in a heartbeat. And we just had a  
14 case challenging a facial challenge to a statute in Vermont

11:58AM 15 about harassment by electronic means where somebody was  
16 posting, tagging somebody as a racist and there's apparently  
17 a group that then attack the business and whether that was a  
18 violation. And I found standing because even though the  
19 Attorney General was like we're not going to do this and we

11:58AM 20 don't enforce these, it had happened once and there's no  
21 guarantee that it won't. But people do disavow: We're not  
22 going to do this again. And we, you know, a City Council can  
23 do that.

11:59AM 24 And that's not happening in this case, either. So I'm  
25 not hearing there will be no more checkpoints. There will be

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11:59AM 1 no more than one ticket for tinted windows. So those are all  
2 things that are concrete and it's not a statement like don't  
3 violate the Fourth Amendment. I mean, I could order those  
4 things, if the proof merited it.

11:59AM 5 **MR. RUSS:** I definitely think that you could order those  
6 things. And I hesitate to say this but I think some of that  
7 relief, we'd probably stipulate to.

8 **THE COURT:** I agree. And I raise that because those are  
9 kind of things that -- that's why I asked Ms. Wilner if those  
12:00PM 10 two components, how much would be left of injunctive relief  
11 and she had, you know, good answers but, yes, that is what  
12 happens in some of these cases, without an admission of  
13 liability, this isn't going to happen and that's not going to  
14 happen.

12:00PM 15 **MR. RUSS:** Right. So --

16 **THE COURT:** That's kind of beyond what we have to do for  
17 Class Certification.

18 **MR. RUSS:** That's all right, your Honor. It's, it's  
19 more fun than talking to a wall, so no worry.

12:00PM 20 Other things about the injunctive relief Traffic  
21 Enforcement Class. I told you the practice has stopped but  
22 what happens if you enter an injunction and it's violated,  
23 does the Court have to enforce everything, does the Court  
24 have to address every claimed violation of the injunction?

12:00PM 25 Does the Court have to involve itself in the operations of

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12:01PM 1 the Buffalo Police Department?

2 I'm not sure that it's something that the Court would  
3 want to do, let alone be equipped to do and a concrete  
4 specific injunction about one practice, you know, that's  
12:01PM 5 easily monitored but this kind of nebulous amorphous concept  
6 of a plan, practice, I don't know how the Court deals with  
7 that and I don't know that the Court wants to deal with that.

8 You asked some questions and there was some discussion  
9 of the plaintiffs' expert report, Gennaco Report. And what I  
12:01PM 10 wanted to add to the discussion, your Honor, is that that 120  
11 something page report talks about ideal practices and best  
12 practices and what certain police departments do and should  
13 do and what the Buffalo Police Department does and should do.

14 And I would just say, your Honor, that I don't think it  
12:02PM 15 has any relevance to this motion right now, first of all.  
16 And, second of all, if it does, the fact that the Buffalo  
17 Police Department may not use best practices does not equal  
18 constitutional violations. So, that they could improve their  
19 practices doesn't give rise for some kind of finding of  
12:02PM 20 discrimination and result in an injunction.

21 **THE COURT:** I think the answer was -- and it was a good  
22 one -- is that all of the Class members could use the same  
23 expert and whether it would be admissible in this particular  
24 case is a whole different issue but they wouldn't need to go  
12:03PM 25 out and get their own experts because they would use this

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12:03PM 1 report.

2 **MR. RUSS:** I'm not going to concede that, your Honor.

3 But let's say that, that was the process. Don't you have to  
4 evaluate whether the challenged practices went into the

12:03PM 5 setting up of every checkpoint and each officer's disposition

6 on a certain night in a certain neighborhood, you know, went

7 into the kind of was not a best practices thing, was not a

8 discriminatory? I mean, I understand that the report is

9 probably helpful to kind of tell the background and to show

12:03PM 10 that the police department does have problems. But I don't

11 know how it translates into each individual Class member's

12 claim.

13 **THE COURT:** I agree.

14 **MR. RUSS:** We spent a lot of time talking about the

12:04PM 15 Checkpoint Class and the Tinted Windows Class and the point I

16 want to make, your Honor, and the point I would have tried to

17 make if I had given you a straightforward formal argument is

18 that while there may be some common questions, there are

19 unlimited individual questions on both sides, both on the

12:04PM 20 liability side and on the damages side. And the damages you

21 spent a lot of time talking about and I don't need to go

22 through all of that, I don't think.

23 But just the point that I made about, you know, a

24 violation of the Fourth Amendment, how did that affect that

12:05PM 25 individual person? What happened to that person because of

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12:05PM 1 it? That's an individual -- that's an individual analysis.  
2 There's no way you can do that on a common basis.

3 **THE COURT:** Well, they can, they can do that. They can  
4 say for each Fourth Amendment violation, we are seeking a  
12:05PM 5 allegedly nominal sum of damages of \$100 per Class member.  
6 They can do that. That's one way. And then they say, you  
7 know, don't worry about that because we're going to stop our  
8 damages after that secondary detention. So, if you were  
9 going to base it on the first detention which we're saying is  
12:05PM 10 unconstitutional, the secondary detention unconstitutional,  
11 we weren't going to take up whether you get arrested, you get  
12 strip searched, whether you're detained for three hours  
13 later, whether there's probable cause, whether there's no  
14 probable cause, that's all not going to be part of our case.  
12:06PM 15 And they can carve out their case that way and arguably they  
16 probably would make their case easier if they carved out  
17 individual damages, period, that way. But that's why I  
18 started with they're the masters of their complaint and they  
19 can decide how to plead it.

12:06PM 20 **MR. RUSS:** That's not how it's pled.

21 **THE COURT:** I agree.

22 **MR. RUSS:** And as the defendant, I have to address how  
23 it's pled. And the pleadings seek those kind of damages  
24 which are individual damages.

12:06PM 25 Maybe some aspect of it could be the dairy farmer



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12:06PM 1 formula like we were stopped once, then we were stopped  
2 twice, you know, that's a hundred dollars. But if you start  
3 getting into how long were you stopped the first time, how  
4 long were you stopped the second time, what happened, that's  
12:07PM 5 just all individual. And I, I don't know how we do that with  
6 the thousands and thousands and thousands of plaintiffs here  
7 considered.

8 **THE COURT:** It's after noon now. And, like I said,  
9 we're here all day and we tried to get an earlier flight  
12:07PM 10 based on your time period. We didn't get one so we can go  
11 all day.

12 Would you like to break for lunch and come back because  
13 we're going to have a little bit of time for rebuttal so it  
14 seems like it might not be a bad idea.

12:07PM 15 **MR. RUSS:** I want to make the court happy. So if that  
16 is what makes the court happy, I'm happy.

17 **THE COURT:** We do have court staff. I could continue  
18 but I want to give them a break, as well. Why don't we come  
19 back at five after 1 for resumption, and does that work for  
12:07PM 20 everybody?

21 **MR. RUSS:** Yes, your Honor, thank you.

22 (WHEREUPON, luncheon recess taken.)

23 (Open court:)

24 **THE COURT:** We are back on the record in *Black Love*  
1:14PM 25 *Resists in the Rust, et al. v. the City of Buffalo.*

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1:14PM 1           Reminder to the people on YouTube, that we do not allow  
2 any recording.  
3           And we are in the defendant's argument.  
4           And you may resume.

1:15PM 5           **MR. RUSS:** Thank you, your Honor.  
6           And for the people out there in hyperspace, I'm Hugh  
7 Russ representing the defendants.  
8           And I'm close to finishing, your Honor. I did want to  
9 make a few more points. Before I do, I, again, want to thank  
1:15PM 10 the Court for coming to Buffalo and bringing its staff to  
11 Buffalo. This really has been helpful, so thank you.  
12           I wanted to say a couple more things about damages.  
13 Counsel made the point that the plaintiffs' Monell claims  
14 could be a general question for the entire Class or Classes.  
1:15PM 15 And I think that's probably right whether the City had a  
16 policy, custom or procedure that applied, I think is a  
17 general question. But whether it applied in each  
18 circumstance and that's -- you know, the police officers at  
19 issue were acting out of some general policy or procedure --  
1:16PM 20 is an individual question that has to be addressed at every  
21 single stop.  
22           The Court asked some questions and counsel made some  
23 argument concerning whether there was financial motive to  
24 issue the tickets and while there have been documents and  
1:16PM 25 other evidence seeming to suggest that the City was trying to

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1:16PM 1 raise revenue through the issuance of more and more traffic  
2 tickets, all of the individual officers who testified during  
3 depositions said that that was not their motive, that  
4 overtime wasn't their motive, that the number of tickets  
1:17PM 5 wasn't their motive, that they were just doing their job.  
6 So --

7 **THE COURT:** But, but that's -- self-serving testimony  
8 can be admissible. There are documents that talk about  
9 overtime incentives and the desire to have maximum  
1:17PM 10 enforcement of the traffic laws and you need to be issuing  
11 those tickets and I think one of the phrases "we're looking  
12 for production". So, that will be a question of fact.

13 My concern was much more specific. It's one thing to  
14 say in the checkpoints, these officers were allegedly  
1:18PM 15 motivated by amping up their production to get overtime.  
16 It's another thing to say in the entire City of Buffalo, all  
17 the time for every reason, these people were stopping  
18 individuals and violating their rights in order to garner  
19 more overtime and rise up in their career. And the  
1:18PM 20 conversation was about, well, almost every police department  
21 probably recognizes productivity and, you know, I mean, how  
22 would that be a claim that would be proveable and that's more  
23 of a question for a motion to dismiss but that was what I was  
24 concerned about. Any thoughts about that?

1:18PM 25 **MR. RUSS:** As usual, your Honor, you have phrased it

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1:18PM 1 better than I have. But I think that's the exact concern.  
2 And the attendant concern is -- related concern is  
3 complimented by the point that the City changed its system of  
4 traffic tickets from a state-based system to a City-based  
1:19PM 5 system so that it could keep the revenues. Every City, town,  
6 village in New York does that or did that and the City was  
7 actually very late in doing that. So, yes, it is evidence of  
8 something but I don't think it's evidence of the Fourth  
9 Amendment violation that plaintiffs believe.

1:19PM 10 I was listening to counsel's argument about damages and  
11 what damages they were seeking and what damages they weren't  
12 seeking and at one point I heard, oh, only general damages  
13 but then I heard also individual damages and I don't think  
14 they know, first of all, but, second of all, as soon as you  
1:19PM 15 go into individual damages, you have individual questions  
16 that make a Class inappropriate.

17 I wanted to call the Court's attention to one case in  
18 our brief: *Townes*. And that stands for the proposition that  
19 even if there is an unConstitutional stop, if the discipline  
1:20PM 20 meted out, that is the tickets, are valid and reasonable and  
21 lawful, then you can't recover damages for the ticket and the  
22 attending damages, you can only recover for the  
23 unconstitutional stop and so that's going to have to be  
24 applied to every, every individual claim and, again, that  
1:20PM 25 frustrates the Class treatment.

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1:21PM 1           **THE COURT:** Do you think, though, that that shifts if  
2 the claim is limited to any time there's more than two  
3 tickets or two tickets and more for tinted windows? Because  
4 I think the argument is, you never need to do more than one.  
1:21PM 5 It's unlikely that a driver has a tinted windshield and  
6 nothing else. So, it's likely the whole car's tinted because  
7 that's the whole purpose. So you can kind of assume that one  
8 ticket would serve the whole car. And then you don't really  
9 have to get into whether it should have been issued or it  
1:21PM 10 shouldn't have been issued because you're talking about the  
11 number as opposed to whether it was valid.  
12           **MR. RUSS:** I understand that concern, your Honor. I  
13 would call the Court's attention to another case in our  
14 brief. It's *Torres*. And that involved, rather than moving  
1:22PM 15 violations, that involved parking violations. And the Court  
16 basically held that multiple parking violations within a  
17 relatively short time period were permissible and, you know,  
18 I think it's the same, same idea here. Is issuing multiple  
19 tinted windows the best judgment? Or the best use of police  
1:22PM 20 time? Probably not. But it is permissible and --  
21           **THE COURT:** Well, it's certainly permissible but I think  
22 that their argument is different than that. They're saying  
23 the stop was unlawful, unconstitutional. The secondary  
24 inspection: Unconstitutional, unlawful. And anything that  
1:22PM 25 flows from it is the fruit of the poisonous tree but we're

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1:23PM 1 going to limit our claims to two tickets for tinting because  
2 one ticket would suffice and we can show that black and  
3 Latino drivers caught the two tickets and more and the white  
4 drivers were, you know, given one ticket. So even if that  
1:23PM 5 was permissible, that would still be discriminatory and it  
6 wouldn't be okay just because you can do it.

7 I mean, there's lots of things you can do, like if you  
8 strip search every female who goes to a jail, even if you  
9 have the right to strip search visitors to the jail but  
1:23PM 10 you're singling out the females, you could still have a  
11 constitutional claim. So I think that they're narrowing that  
12 down fairly finally in terms of trying to target what is  
13 unconstitutional and what flows from it.

14 Why isn't that -- if the first stop and the second stop  
1:24PM 15 are unConstitutional for sake of argument, why wouldn't it be  
16 the fruit of the poisonous tree?

17 **MR. RUSS:** First of all, your Honor, the *Townes* case  
18 that I mentioned talks in that language. So I would  
19 encourage the Court to read it. And the Court says no,  
1:24PM 20 that's not the fruit of the poisonous tree.

21 Secondly, your Honor --

22 **THE COURT:** So I read *Townes* but remind me: They found  
23 no Fourth Amendment violation or they found a Fourth  
24 Amendment violation and they said you can't recover for the  
1:24PM 25 consequences of it. You can recover for the violation but if

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1:24PM 1 the ticket that results or the arrest that results is valid,  
2 no recovery for that. Isn't that how it came out?

3 **MR. RUSS:** That's exactly how it came out.

4 **THE COURT:** Okay.

1:24PM 5 **MR. RUSS:** The second thing I would say, your Honor, is  
6 that in the example you mentioned of the strip searching of  
7 women, that's a situation -- or I hear that's a situation  
8 where every single woman is stopped and strip searched, that  
9 there's no discretion involved, some get passed through the  
1:25PM 10 system without it, others don't. And I think the tinted  
11 windows situation, it just would require more individual  
12 questions. Why were you -- why did you issue four or why did  
13 you issue three or why did you issue two? And the  
14 circumstances of that depend on each situation. And, again,  
1:25PM 15 I don't know how you do that on a Class basis.

16 **THE COURT:** I think you could possibly do it on the  
17 checkpoints. I'm not persuaded you could do it elsewhere.

18 **MR. RUSS:** I would think that -- and I'm sorry I keep  
19 referring back to your dairy farmer Class action idea -- but  
1:26PM 20 if, if the Checkpoint Class were limited to, you know, some  
21 similar question, were you stopped or not and then the  
22 damages from that might be, you know, \$25 per tinted window  
23 or something like that, some, some formula, then I could see  
24 a Class limited like that. But to have to evaluate  
1:26PM 25 everything that happens and that happened and why it happened

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1 and who did what and how people felt, that's just not right.

2 **THE COURT:** Well, they're -- plaintiffs are telling the  
3 Court: We're not going to do that. We're going to stop at  
4 that secondary stop and so we're going to prove the first

5 stop was unconstitutional. The second detention unreasonably  
6 prolonged a unconstitutional stop and that's it. We're not  
7 going to get into whether the arrest was good or not. We're  
8 not going to be seeking to recover for that. Because I asked  
9 the same question you're asking: Isn't it a different injury

10 if you're arrested without probable cause versus there's an  
11 arrest warrant, it's valid and that's why you're taken into  
12 custody and they said we're not going to be doing any of  
13 that.

14 So if they limit it that way to the first and the second  
15 stop, why wouldn't that be a common question that wouldn't  
16 require any kind of individualized inquiry? Because  
17 according to them -- and I think there's a concession --  
18 everybody's stopped. Everybody that goes through the  
19 checkpoint is stopped. It's not like a DUI checkpoint where  
20 there's a preexisting we're going to stop every fourth car.  
21 It's everybody.

22 **MR. RUSS:** Just on that, your Honor, I think some people  
23 were waved through so I don't think everyone was stopped.

24 And when you were asking questions about, well, how do you  
25 identify people that didn't get the tinted windows -- that



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1 were stopped but didn't get the tinted windows?

2 **THE COURT:** So you think that there was no -- that some  
3 people didn't even have to brake, they were just waved  
4 through.

5 **MR. RUSS:** Well, they had to slow down and come through  
6 slowly but, yes, certainly some were just waved through  
7 (indicating). I had a brilliant answer for you and I lost  
8 it. I apologize.

9 So, that's a long way of saying, your Honor, that on the  
10 damages Classes, there are just way too many individual  
11 questions. There may be some common questions but the  
12 predominance is not common questions. The predominance is  
13 decidedly individual questions.

14 I wanted to just mention a couple more things. Counsel  
15 mentioned something like only 1 percent of the cases are  
16 seeking individual damages and that the, that's the tail  
17 wagging the dog. They still require work and, you know, if  
18 they're thousands and thousands and thousands of people, that  
19 means that thousands and thousands and thousands of discovery  
20 demands, maybe depositions. So, just because it may be a  
21 minor part of the damages claimed, you know, does not  
22 eliminate the work involved in getting this case ready.

23 I know the Court has asked good questions, frankly, and  
24 I've done my best to answer them but if there's anything else  
25 that you need at this point, I'm happy to try.

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1:30PM 1 **THE COURT:** Nope, thank you. You did a nice job.

2 **MR. RUSS:** Thank you, your Honor.

3 **THE COURT:** Any rebuttal argument?

4 **MR. WILNER:** Yes, your Honor. Thank you.

1:30PM 5 So I'd like to start with clarifying some of the points  
6 that were raised just in this last discussion and then I have  
7 a few more points I'd like to address after that that go back  
8 to the conversation that was happening before the break.

9 So -- and I'll start with the applicability of the  
1:31PM 10 *Townes* case which you were just discussing. *Townes* does not  
11 create a need for individual determinations in this case.  
12 *Townes* is a Fourth Amendment case and it applies only to  
13 Fourth Amendment violations and as your Honor observed and  
14 I'm just making very clear, we are not seeking damages for  
1:31PM 15 tickets and arrests. We're really not seeking damages for  
16 arrests at all but tickets under the Fourth Amendment.

17 *Townes* does not apply to the Equal Protection Clause and  
18 we know that has to be true because the Supreme Court has  
19 held that racial discrimination is actionable regardless of  
1:32PM 20 whether the stop is supported by probable cause.

21 And, lastly, just in terms of the facts of *Townes*,  
22 *Townes* held that un -- that damages for unlawful detention  
23 are available under the Fourth Amendment. In that particular  
24 case, Mr. *Townes* didn't seek damages for unlawful detention.

1:32PM 25 All of the damages that he was seeking were for the

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1:32PM 1 imprisonment that happened after he was charged and then he  
2 was tried, he was in jail for a long time. The conviction  
3 was eventually reversed because the -- I think there was a  
4 bad stop and search at the beginning of it. So the Court  
1:32PM 5 held that there was an intervening causation factor that  
6 prevented him from being able to recover for those damages  
7 that occurred after the prosecution and punishment for those  
8 charges. But the Court absolutely held that damages would be  
9 available for the unlawful detention prior to the intervening  
1:33PM 10 act of the prosecutor and the judge.

11 And that's what we're seeking in this case: That  
12 unlawful detention window. So there is no need to get into  
13 individualized questions of probable cause for that.

14 The other case that counsel just brought up, the *Torres*  
1:33PM 15 case, that was a case about procedural due process violations  
16 with parking tickets. And we haven't raised a procedural due  
17 process claim in this case. *Torres* does not speak to whether  
18 multiple ticketing can violate the Equal Protection Clause  
19 and, clearly, if multiple ticketing is motivated by racial  
1:34PM 20 animus, it can violate the Equal Protection Clause.

21 I think this takes me into the issue of the Tinted  
22 Windows Class and your Honor had expressed some doubt about  
23 whether perhaps there was sufficient commonality or whether  
24 it would be necessary to look into officer level motivations  
1:34PM 25 for the tint -- for the Equal Protection Claims. And, again,

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1:34PM 1 our primary claim for Class purposes is that the  
2 Commissioners who were setting the policy were acting with a  
3 racial motivation. And that that setting of policy allowing  
4 the discriminatory tinted windows ticketing to continue when  
1:35PM 5 they knew all about the practice, allowing it to go forward,  
6 that that harmed our Class members, and our Class members can  
7 recover for that harm.

8 And it's not important to decide for that, for that  
9 issue whether or not, in addition, there was a separate and  
1:35PM 10 additional violation of the Equal Protection Clause by the  
11 officer who issued the ticket. If a racially discriminatory  
12 policy is harming all members of the Class, then all members  
13 of the Class are entitled to recover for that harm.

14 **THE COURT:** But the proof of the harm, so the evidence  
1:35PM 15 that's going to answer that, as the *Wal-Mart* case talks about  
16 evidence that's going to answer questions, where is that  
17 evidence going to come from and how is it going to be kind of  
18 processed on a Class certification basis? So, never mind the  
19 checkpoints because you are not confining it to the  
1:36PM 20 checkpoints, where is that common proof coming from?

21 **MR. WILNER:** Yeah. Well, *Arlington Heights* sets out a  
22 mosaic of factors that are used to decide discriminatory  
23 intent. A really important aspect of the *Arlington Heights*  
24 standard is statistical disparities so that's one piece of  
1:36PM 25 evidence that we're going to be relying on and the

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1:36PM 1 statistical disparities in terms of multiple tinted windows  
2 tickets are really stark. The practices were ubiquitous so  
3 they were practices that were known to everybody in the  
4 Buffalo Police Department and the Commissioners all testified  
1:36PM 5 that they knew about them. There is other evidence that we  
6 plan to introduce under Arlington Heights that goes to racial  
7 animus within the Buffalo Police Department, the historical  
8 context, all of those factors. So this is common evidence  
9 that will get to the question of whether there was a  
1:37PM 10 discriminatory intent on behalf of the Monell policymaker.  
11 And if the jury agrees with us that there was such an intent,  
12 then the City is going to be liable for the harm that flowed  
13 from the discriminatory policy.

14 **THE COURT:** Okay.

1:37PM 15 **MR. WILNER:** I wanted to also briefly address the issue  
16 about being waved through checkpoints and want to state  
17 unequivocally that that first passing through a checkpoint is  
18 a seizure for Fourth Amendment purposes. I don't think  
19 there's any "waved-through" at the checkpoints because  
1:38PM 20 everybody who was waved through was still subject to a visual  
21 inspection for details that could be observed at common view  
22 that wouldn't be observable if they weren't slowed down to  
23 either a stop or an extremely slow roll. As well, none of  
24 the Class members, none of the people passing through the  
1:38PM 25 checkpoints being subject to that initial inspection were

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1 free to leave. In fact, the policy specifically required  
2 that police should chase down and stop anybody who seemed  
3 like they were trying to evade a checkpoint. So it's very  
4 clear that even that first passing through the checkpoint was  
1:38PM 5 a seizure for Fourth Amendment purposes.

6 **THE COURT:** So the secondary checkpoint, not an issue.  
7 Are there cases that say wave-through is a seizure?

8 **MR. WILNER:** I would have to look and see if there's  
9 specific cases, your Honor, but the general Fourth Amendment  
1:39PM 10 standard for a seizure is going to turn on whether the person  
11 would been free to leave the police encounter and there --  
12 people were not free to leave. They absolutely were subject  
13 to that stop and that was, it was a stop that was made  
14 entirely without any kind of individualized suspicion. It  
1:39PM 15 was dragnet policing in black and Latino communities.

16 But if that's a point that would be helpful to have more  
17 commentary on it, we can look and see if there are cases that  
18 specifically look at that first pass and provide it after the  
19 argument.

1:39PM 20 **THE COURT:** Well, I'm not aware of any case that says a  
21 wave-through is a stop. But I'm also not aware of anything  
22 that says if you have to go through the checkpoint to get to  
23 your home or to get into a neighborhood or go to the grocery  
24 store and instead of coming to a full stop, you're allowed to  
1:40PM 25 slowly roll through it, that's not a seizure because we want

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1 those brakes on, that seems kind of a crazy standard, so.

2 **MR. WILNER:** Okay. I'll leave it there, your Honor.

3 I'd like to address some of the points regarding damages  
4 and I don't think that we've talked a lot about how general

5 damages would be determined. I'm not sure if that's a  
6 question that the Court may have concerns about. But we've  
7 cited a number of cases in our materials in which general  
8 damages were awarded in Class Actions. The jury has  
9 determined the amount of the general damages but it is

10 essentially a trial by formula.

11 So how we would see this working, for example, for the  
12 unlawful detentions is that the jury would determine the  
13 dollar value of the length of time of the detention and then  
14 that formula would be applied to every Class member who

15 passes through the checkpoint. And there really isn't a lot  
16 of authority or examples out there to apply general damages  
17 to an Equal Protection violation. But the principle is the  
18 same: That it would be up to the jury to determine uniform  
19 amount to apply that is tied to the inherent harms of the

20 constitutional violation and that is the amount that every  
21 Class member would get.

22 **THE COURT:** So I think our focus was not so much on what  
23 the jury would do, although that's a good point, because the  
24 jury's going to do what you ask it to do or the Court asks it  
25 to do. And at this point, from plaintiffs' standpoint, there

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1 isn't any kind of formula, or at least I didn't see one  
2 proposed, of this is how we're going to do it. And that's  
3 when I asked, you know, pragmatically what are you going to  
4 be seeking and how would that happen and what would it look

1:42PM 5 like? And I suggested to opposing counsel you could say \$100  
6 for every stop. You're suggesting you would potentially tie  
7 some monetary amount to the duration of the stop.

8 **MR. WILNER:** Correct. And we did in our opening brief  
9 in the section of the brief that discusses manageability,

1:42PM 10 there is some discussion of how -- and actually I believe we  
11 covered it in our reply brief, as well. So we have offered  
12 some examples of how courts have administered general damages  
13 in Class actions in other cases. The question of individual  
14 damages, again, we believe that the primary individual

1:43PM 15 damages in this case are the economic harms that are already  
16 known and stored in City records and where those damages are  
17 very easily administered.

18 **THE COURT:** But this is where I really think the  
19 defendants have some traction. You could say the tip of  
1:43PM 20 iceberg. You can say it's a small fraction of what we're  
21 doing. But in terms of court time and the need for  
22 evidentiary hearings and whether it fits into Rule 23 and is  
23 going to be effective, that's where it doesn't matter if  
24 it's, you know, a request for \$25. If we're going to have a  
1:44PM 25 jury trial on it, that's going to be where it breaks down.



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1:44PM 1 So that's the concern is not that it's just a small  
2 fragment of what you're requesting, it's the time constraints  
3 in that fragment and whether it makes sense if we, I mean,  
4 what are we going to have an evidentiary hearing for 6,000,  
1:44PM 5 10,000 people? I mean, that would be unmanageable.

6 **MR. WILNER:** I agree that that could potentially be  
7 unmanageable but that's not a reason to deny Class  
8 Certification now. So, for starters, if we look at the --

9 **THE COURT:** But their point is -- and I agree you've got  
1:44PM 10 the better point -- their point is that takes predominance  
11 out. So if you're talking about 10,000 evidentiary hearings  
12 on individual damages and I look at the common, you know, the  
13 commonality and the predominance and what can I get resolved  
14 as a Class, their argument is this pie is way bigger and so  
1:45PM 15 this isn't a Class Action suit. You're not going to be able  
16 to achieve much by proceeding as a Class.

17 I agree with you that courts often do it this way  
18 anyways because at least it's easier to manage some parts of  
19 the case but that's the concern.

1:45PM 20 **MR. WILNER:** Yeah. And I, I absolutely understand the  
21 concern. I mean -- the *Betances* case I think we just  
22 submitted in a supplemental briefing, I think the Court in  
23 that case was very thoughtful about the different kinds of  
24 damages and how they were handled. The Court in that case  
1:45PM 25 absolutely said that it was always appropriate to certify the

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1:45PM 1 Class at least for the liability phase and *In re Nassau*  
2 *County Strip Search Cases* says the same thing because in  
3 liability, all of the issues are common. So at least for  
4 liability Class certification, it's definitely appropriate.

1:46PM 5 In *Betances*, the Court then went on to also look at how  
6 it could administer at least those parts of damages that were  
7 common and were general. I proposed to the Court because  
8 Class certification is flexible and the court always retains  
9 a lot of control over how to manage the proceedings and, for  
1:46PM 10 that matter, defendants can move to decertify a Class at any  
11 time. And in *Betances*, I think they moved four times to  
12 decertify the Class as the Class moved along.

13 The most efficient thing to do is to certify the Class  
14 based on the overall predominance of the liability and the  
1:46PM 15 fact that most damages questions are common, to adjudicate  
16 the common questions which includes liability and the common  
17 damages, and then at that point we'll know a lot more about  
18 whether there even are individual damages claims. At this  
19 point they don't even know if they will materialize. But if  
1:47PM 20 they do materialize, we'll have a much better idea of how  
21 significant they are, how many people are bringing them on,  
22 and then can decide what to do. And it may be at that point  
23 that the Class needs to be decertified, if there is an  
24 unmanageable number of individual Classes.

1:47PM 25 But if you're looking at this from a superiority

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1 perspective, those Class members are so much better off  
2 having liability determined which would be probably  
3 impossible for them to do on their own without us to  
4 represent them in that trial, having their general damages

1:47PM 5 determined, having their economic harms determined. That  
6 leaves a small amount for them to handle on their own as  
7 opposed to just abandoning them to have no recourse for those  
8 claims.

9 That said, I do want to say I can't stand up here today  
1:48PM 10 and disclaim those damages because I would need to have  
11 conversations with our clients. But if the Court feels that  
12 this issue really would be an impediment to certification, we  
13 certainly would like the opportunity to discuss it with our  
14 clients and, you know, reconsider the position that's been  
1:48PM 15 taken here today.

16 **THE COURT:** So I'm not an interventionalist judge and  
17 don't get involved. I point out -- like if you discontinue  
18 the practice of issuing two tickets for tinted windows some  
19 of the injunctive relief goes out the window. It's nothing  
1:48PM 20 you can't see for yourself. You decide what you want to do.  
21 I've expressed my concerns about that portion of the case.

22 **MR. WILNER:** Okay. Thank you very much.

23 I'd like to go back to the traffic enforcement Class and  
24 answer, I think a few doubts that I heard from the Court on  
1:49PM 25 that Class. And I'd like to stop -- or, actually, start with

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1:49PM 1 the Class definition. And this is not a boundless Class.  
2 This is a Class comprised of people who have been or will be  
3 subjected to traffic stops, traffic tickets and traffic  
4 safety vehicle checkpoints.

1:49PM 5 **THE COURT:** Think about it this way. I've got to issue  
6 a notice -- and you'll be helping me draft it, along with the  
7 defendant if I grant Class certification -- who is that  
8 notice going to.

9 **MR. WILNER:** Yeah. So for the (b)(2) certification,  
1:49PM 10 there is no requirement for individualized notice.

11 **THE COURT:** But still who's it going to? It's going to  
12 be in the newspaper --

13 **MR. WILNER:** Yes.

14 **THE COURT:** -- and it's going to say if you are black or  
1:50PM 15 Latino and you plan to drive -- and you have driven in  
16 Buffalo or you plan to drive in Buffalo, you may be a Class  
17 member?

18 **MR. WILNER:** The way we usually handle notice for (b)(2)  
19 Class actions is notice by publication, as well as usually  
1:50PM 20 we'll provide notice to places that are likely to have a  
21 proof of contact with Class members so that they can provide  
22 notice. So, for example, the Legal Aid Society that's often  
23 representing defendants in tickets, legal, other legal  
24 services programs, community organizations that are in the  
1:50PM 25 community. So we would provide notice --

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1:50PM 1       **THE COURT:** I'm not --

2       **MR. WILNER:** That --

3       **THE COURT:** -- so concerned with where.

4       **MR. WILNER:** Yes.

1:50PM 5       **THE COURT:** Would it say: If you're black or Latino --

6 I'm looking at your --

7       **MR. WILNER:** Yes.

8       **THE COURT:** -- definition, that's what it would say?

9       **MR. WILNER:** Yes. The notice would provide the Class

1:51PM 10 definition as well as to me it makes sense because the (b) (3)

11 Class members would be each entitled to an individual notice

12 of the certification of the damages Classes and so it would

13 make sense to me to also include specific individual notice

14 to them. They would also be members of the traffic

1:51PM 15 enforcement Class. So they would -- it's not required under

16 the rules but it would be no extra cost to provide a

17 specific --

18       **THE COURT:** And would you agree with me that the Class

19 would then include any black or Latino individual who either

1:51PM 20 drives currently or may want to drive in the future in

21 Buffalo?

22       **MR. WILNER:** No, that would be an overbroad look at the

23 Class definition. The Class definition is limited to people

24 who are actually subjected to traffic stops, traffic tickets,

1:51PM 25 and traffic safety vehicle checkpoints.

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1:51PM 1       **THE COURT:** Or will be.  
2       **MR. WILNER:** The --  
3       **THE COURT:** Or will be.  
4       **MR. WILNER:** Or will be. But they don't become a member  
1:52PM 5 of the Class until they actually experience the traffic  
6 enforcement. It's a little weird but that's the way that  
7 courts normally think about it. So it's in determinant in  
8 the sense that the Class contains future members whose  
9 identity is not known now but when they become subject to the  
1:52PM 10 particular defined activity, they are known. And a traffic  
11 stop, a traffic ticket, these are things that the City of  
12 Buffalo has records of. So there isn't ever really a  
13 question about who is and isn't a member of the Class. And  
14 then, furthermore, all the relief is directed at the  
1:52PM 15 defendants, it's directing them to change their practices.  
16       **THE COURT:** So if it was retrospected, it's  
17 ascertainable. I don't see how it's ascertainable if we're  
18 talking about future conduct.  
19       **MR. WILNER:** Well, again, the question for  
1:53PM 20 ascertainability is whether the definition is based on  
21 objective factors. And these are objective factors.  
22       **THE COURT:** Well -- but they can't be speculative. Like  
23 if the objective factor is: Are you likely to be offended if  
24 your car is stopped without reasonable suspicion, I could say  
1:53PM 25 that's objective. But there's no way of you have to get into

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1:53PM 1 some subjective analysis: Is the person going to be  
2 offended? And when you get into will be subjected to traffic  
3 stops, traffic tickets and traffic safety, you're not talking  
4 about any collected data that the City has produced. You're  
1:53PM 5 talking about somebody who says this hasn't happened to me  
6 but it may happen to me in the future and then I'm going to  
7 be part of the Class. That seems like it would be everybody.  
8 Anybody who was -- unless they're not committed to never  
9 driving.

1:54PM 10 **MR. WILNER:** I...  
11 My cocounsel reminds me that in *Floyd* and in *Plaintiffs*  
12 *1 through 21 v. county of Suffolk*, very similar Class  
13 definitions were approved and it was -- it is the same issue  
14 of people now and in the future being subjected to certain  
1:54PM 15 policing practices. So --

16 **THE COURT:** Did you know what those, what the future  
17 Class, the language of the future Class in those cases was?

18 **MR. WILNER:** I can look it up and maybe I can go -- I  
19 mean, I could go on to address other issues while we look it  
1:55PM 20 up.

21 **THE COURT:** Why don't you do it as a supplemental.

22 **MR. WILNER:** Yes.

23 **THE COURT:** Because I haven't seen something that broad.

24 **MR. WILNER:** Yes, okay, I think that's a good idea.

1:55PM 25 That will give us a chance to gather together some more

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1:55PM 1 examples for you.

2 Thank you, your Honor.

3 So I wanted to address the relevance of the Gennaco

4 Report for this traffic enforcement class. And we have a

1:55PM 5 deliberate indifference *Monell* theory in this Class. That is

6 one of the main things that we are planning to prove.

7 A major part of our deliberate indifference theory is

8 that the City can did not properly handle complaints of

9 racial discrimination in traffic enforcement that it received

1:55PM 10 through its Internal Affairs Division and through other

11 sources.

12 And another important aspect of our deliberate

13 indifference theory is that the City did not properly audit

14 or supervise or train its officers. The Gennaco Report is

1:56PM 15 not that the Buffalo Police Department didn't use best

16 practices. It's that the practices of the Buffalo Police

17 Department in all these areas fall below generally accepted

18 standards and that they did so in a way that's likely to

19 cause discrimination to continue in the future.

1:56PM 20 So, the Gennaco testimony is really there as a core

21 underpinning of establishing the *Monell* deliberate

22 indifference that really is at the heart of the prospective

23 claims. And this kind of evidence is really traditional and

24 well-trodden path to proving deliberate indifference on the

1:57PM 25 part of police officials and police policymakers. So that



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1 would be the purpose of the Monell report. It's not on Class  
2 certification -- or excuse me, Gennaco Report on Class  
3 certification. It's really to establish the common body of  
4 evidence.

5 But when we get into the trial of this case, it will be  
6 there to show that the City is deliberately indifferent and  
7 that there is an intent to discriminate that rises to the  
8 level of a municipal policy.

9 **THE COURT:** And your deliberate indifference is which  
10 claim?

11 **MR. WILNER:** It's the Equal Protection Claim, deliberate  
12 indifference to ongoing racial discrimination.

13 Now the opposing counsel had criticized the injunctive  
14 relief we were seeking as not being specific. But there  
15 isn't a requirement under Rule 23 that injunctive relief be  
16 specifically enumerated in the complaint or at the Class  
17 certification stage.

18 What Rule 23 requires is that we establish -- and this  
19 is Rule 23(b)(2) -- that defendants have acted or refused to  
20 act on grounds that generally apply to the Class. And the  
21 deliberate indifference *Monell* theory, that's our primary  
22 theory for this claim. That is exactly refusing to act on  
23 grounds that are generally applicable to the Class.

24 The other piece of the definition is so that final  
25 injunctive relief is appropriate with respect to the Class as

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1:59PM 1 a whole. And if the Court finds or the other -- in this  
2 case, it's an injunction so you would be the fact-finder. If  
3 the Court finds that the City was deliberately indifferent to  
4 ongoing violations of the Equal Protection Clause, then  
1:59PM 5 injunctive relief would be appropriate for the Class as a  
6 whole because the remedy that would be applied would be  
7 reforming those policies and practices to prevent the  
8 discrimination from continuing.

9 Now it's really difficult at this stage to say what all  
1:59PM 10 the pieces of the relief are. Because remedies are usually  
11 handled in a separate proceeding after the liability stage,  
12 assuming liability is established. And it's often, as I said  
13 before, a collaborative process. But if it's not a  
14 collaborative process, typically courts will get briefing  
2:00PM 15 from both sides on what they think the injunctive relief  
16 should be. There's often a hearing. There may be testimony  
17 or evidence that's presented about the different practices  
18 and how they should be performed and the Court would use that  
19 information in order to fashion an injunction.

2:00PM 20 **THE COURT:** So, let me make sure I have the right  
21 starting point of how we got here. I thought the plaintiffs'  
22 position is the traffic enforcement Class is about injunctive  
23 relief and you and I had that debate about whether you need a  
24 separate Class for injunctive relief and I was saying I don't  
2:00PM 25 think you do and you were saying I think I do. And that's

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2:00PM 1 why we're getting into "so what are we talking about".  
2 Because if the argument was one of the many things we request  
3 is injunctive relief, that's one thing. The Court is asked  
4 routinely to do that in cases, civil rights cases.

2:01PM 5 If it's I want you to certify a Class now for only for  
6 injunctive relief, then there are more specific questions  
7 about for what, for whom, who's in the Class, how do we  
8 determine who's in the Class, and that's how we got there.

9 **MR. WILNER:** Mm-mm. Well, I think it may be helpful to  
2:01PM 10 address this as well as part of the supplemental brief  
11 briefing.

12 **THE COURT:** Okay.

13 **MR. WILNER:** Because it really all goes together and  
14 maybe me saying more on this topic isn't going to help now.

2:01PM 15 But I would like to provide more of that underpinning for the  
16 Court about how these cases worked with those. What we're  
17 asking for is not something that --

18 **THE COURT:** But even if it, you know, mirrors, it's  
19 great if three other people do it, it doesn't mean that I do  
2:02PM 20 it. So it really makes much more sense if you tell me how  
21 it's going to work in this case as opposed to telling me,  
22 Judge So-And-So in the Southern District of New York did  
23 this --

24 **MR. WILNER:** Well --

2:02PM 25 **THE COURT:** -- okay?

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2:02PM 1           **MR. WILNER:** Yes. We will definitely keep that in mind.  
2           This is a Class that is bringing claims primarily under  
3 the Equal Protection Clause for ongoing violations of the  
4 Equal Protection Clause that go towards racially  
2:02PM 5 discriminatory traffic stops, traffic tickets. And we, if we  
6 establish that, that discrimination is ongoing, that the City  
7 has been deliberately indifferent to it, then we will have  
8 won the liability case and then the remedies would happen  
9 afterwards in order to redress that violation of  
2:03PM 10 constitutional rights and it's a forward-looking claim. So  
11 our standing is to -- we have to be focused on harms that are  
12 happening now and future harms.  
13           Again, there are questions about how the injunctive  
14 relief, once it is articulated, would be managed over time.  
2:03PM 15 Usually --  
16           **THE COURT:** I'm not actually worried about that --  
17           **MR. WILNER:** Okay.  
18           **THE COURT:** -- now. There's often recourse for doing  
19 that. Sometimes the parties have an obligation to try to  
2:03PM 20 work it out themselves. That's not something that is  
21 particularly novel.  
22           **MR. WILNER:** Okay. In that case, your Honor, I'd like  
23 to leave you with these words from *Floyd v. City of New York*.  
24           "If the BPD is engaging in a widespread practice of  
2:04PM 25 unlawful stops, then an injunction seeking to curb that

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2:04PM 1 practice is not a 'judicial intrusion into a social  
2 institution' but a vindication of the Constitution and an  
3 exercise of the courts' most important function: Protecting  
4 individual rights in the face of the government's

2:04PM 5 malfeasance."

6 **THE COURT:** Anything further in this matter?

7 **MR. RUSS:** No, your Honor. I would simply again thank  
8 the Court for coming here, and for its musings. And I would  
9 suggest that as the Court reviews what has happened today and  
2:04PM 10 the briefs and everything else, and look at the transcript  
11 and look at how we either did address or didn't address the  
12 Court's concerns. Thank you.

13 **THE COURT:** All right. Well, we love coming to Buffalo.  
14 It's a good food town, nice midwestern charm. We've been  
2:04PM 15 here before, as the court reporter knows. So no harm in us  
16 coming to Buffalo. I'm going to give you an opportunity to  
17 respond to the plaintiffs' supplemental authority or brief.  
18 So, you know, you'll have 14 days after it comes. Don't wait  
19 too long to give it to me. It's not like the decision's  
2:05PM 20 going to be issued tomorrow but do it in a timely fashion.

21 Anything else that we can address?

22 **MR. WILNER:** No, thank you, your Honor.

23 **MR. RUSS:** No, your Honor, thank you.

24 **THE COURT:** Thank you.

2:05PM 25 **(WHEREUPON, proceedings adjourned.)**

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CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I  
certify that these original notes are a true and correct  
record of proceedings in the United States District Court  
of the Western District of New York before the  
Honorable Christina Clair Reiss on October 23, 2024.

S/ Diane S. Martens

Diane S. Martens, FCRR, RPR  
Official Court Reporter